EB-2019-0166

ONTARIO ENERGY BOARD

IN THE MATTER OF THE *Ontario Energy Board Act*, S.O. 1998, c.15, Schedule B, and in particular Section 21(2) thereof;

AND IN THE MATTER OF the *Assessment Act*, R.S.O. 1990, c.A.31, and in particular Section 25(3) thereof;

AND IN THE MATTER OF an Application by Lagasco Inc. for an Order determining whether or not the natural gas pipelines owned and operated by Lagasco Inc. in Haldimand County are gas transmission pipelines;

BOOK OF AUTHORITIES OF THE MUNICIPAL PROPERTY ASSESSMENT CORPORATION ("MPAC")

October 20, 2020

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TAB 1

inal Law - Topic 4472].

Counsel:

Robert B. McGee, for the appellant;
Christine Tier, for the respondent.

These appeals were heard on April 7, 2005, before MacPherson, Juriansz and MacFarland, JJ.A., of the Ontario Court of Appeal. The following endorsement of the court was released orally on that date.

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[1] By the Court [orally]: The pattern of deposits, withdrawals and purchases from the appellant's accounts provided a basis for the trial judge to disbelieve his testimony. While there were problems with the credibility of Mr. Gilray, his evidence and that of the handwriting expert provided sufficient support for the trial judge's verdict.

[2] The practice that a judge who hears a pretrial does not preside at trial should be assiduously followed. In this case, it was not discovered that the trial judge had presided at the pretrial until after the trial. The judge and counsel could not recall the pretrial. The pretrial conference report indicates that the appellant intended to plead not guilty. The mischief prohibited by rule 27.04, the disclosure of communications or discussion of a guilty plea to the trial judge, did not occur in this case. The trial judge committed no error in dismissing the appellant's motion for a mistrial.

[3] This is an appropriate case for a restitution order as a component of the sentence. The amount ordered by the trial judge reflects the complainant's loss as established in the evidence. The sentence was fit.

[4] The conviction appeal is dismissed. Leave to appeal sentence is granted, and the sentence appeal is dismissed.

Appeals dismissed.

Editor: Rodney A. Jordan/gs

Yonge Street Hotels Ltd.
(applicant/appellant) v. Municipal Property Assessment Corporation, Region No. 9 and the City of Toronto
(respondents/respondents in appeal)
(C42164)

Indexed As: Yonge Street Hotels Ltd. v. Municipal Property Assessment Corp., Region No. 9 et al.

Ontario Court of Appeal
Doherty, Sharpe and Armstrong, JJ.A.
May 4, 2005.

Summary:

A corporation acquired an existing hotel and paid more than $39 million to redevelop it. The building was gutted, but not razed. Its structural elements were left standing. Overhauled from top to bottom, it nonetheless had essentially the same number of rooms and the same overall square footage. The municipality assessed the property on the basis that the increase in the hotel's value was "as a result of the alteration, enlargement or improvement" of the old hotel. As a result, the corporation had to pay significantly higher property taxes than if the increase in value had been "as a result of the erection ... of a building". The corporation applied for an order that, inter alia, the property be reassessed on the basis that the increase in value was "as a result of the erection ... of a building".

The Ontario Supreme Court, in a decision reported at [2003] O.T.C. 591, dismissed the application. The corporation appealed.

The Ontario Court of Appeal dismissed the appeal.

Real Property Tax - Topic 3664

Valuation - Business property - Considerations - New construction vs. renovations - The applicant acquired an existing hotel and paid more than $39 million to redevelop it - The building was gutted, but not razed - Its structural elements were left standing - Overhauled from top to bottom, it nonetheless had essentially the same number of rooms and the same overall square footage - An application judge held that the increase in the hotel's value was "as a result of the alteration, enlargement or improvement" of the old hotel and not "as a result of the erection ... of a building" - As a result, the applicant had to pay significantly higher property taxes than if the increase in value had been "as a result of the erection ... of a building" - The applicant appealed - The Ontario Court of Appeal dismissed the appeal.

Real Property Tax - Topic 3915.1

Valuation - Particular business properties - Hotels - [See **Real Property Tax - Topic 3664**].

Cases Noticed:

Québec (Communauté urbaine) et autres v. Corporation Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3; 171 N.R. 161; 63 Q.A.C. 161, refd to. [para. 14].

Trivest Developments Ltd. et al. v. Toronto (City) (1986), 57 O.R.(2d) 799 (C.A.), affing. (1986), 54 O.R.(2d) 728 (H.C.), refd to. [para. 17].

Statutes Noticed:

Municipal Act, R.S.O. 1990, c. M-45, sect. 447.10(1)(b), sect. 447.10(3) [para. 10].

Authors and Works Noticed:

Driedger, Elmer A., Construction of Statutes (2nd Ed. 1983), p. 87 [para. 15].

Counsel:

Peter A. Milligan and David G. Fleet, for the appellant;

Frank X. Shea and Donald G. Mitchell, for the respondents.

This appeal was heard on March 24, 2005, by Doherty, Sharpe and Armstrong, JJ.A., of the Ontario Court of Appeal. Sharpe, J.A., delivered the following decision for the court on May 4, 2005.

---

[1] Sharpe, J.A.: This appeal concerns the real property tax assessment of a downtown Toronto hotel. The appellant acquired an existing hotel on the subject property in 1997 and paid more than $39 million to re-develop it. The building was gutted, but not razed. Its structural elements were left standing. Overhauled from top to bottom, it nonetheless had essentially the same number of rooms and the same overall square footage.

[2] In 1998, the province established a new scheme for municipal real property taxes based on current value assessments. The new scheme included complex formulae designed to moderate dramatic increases in real property taxes and to maintain equity as between owners of similar commercial properties.

[3] Because the property tax scheme in certain respects treats newly-erected buildings differ-

ently from renovated ones, the issue on this appeal is whether the increase in the value of the hotel was "as a result of the alteration, enlargement or improvement" of the old hotel or "as a result of the erection ... of a building". If, as the appellant contends, the increase in value was the result of the erection of a building, the appellant will pay significantly less in property taxes than it would pay if the increase in value were as a result of alteration or improvement. The difference in taxes would be approximately $500,000 for 2000 and $460,000 for 2001. As the base for calculating annual taxes is typically the taxes levied the previous year, the 2000 assessment will have an ongoing effect on the property taxes payable by the appellant in succeeding years.

[4] The application judge rejected the appellant's argument and maintained the respondent's assessment on the basis of "the alteration, enlargement or improvement" of the old hotel. For the following reasons, I would dismiss the appeal.

FACTS

[5] The old Westbury Hotel, located at 475 Yonge Street, opened in 1963. By 1997 (at which point it had become the Howard Johnson Plaza Hotel), it had fallen into a dilapidated state. The appellant bought it and proceeded to redevelop it as a "Courtyard by Marriott" hotel, which reopened in March 2000. Everything other than the structural elements of the building - i.e., the concrete shear walls, columns, and slabs - was removed. The exterior cladding and windows were stripped away. Roofing, interior walls, flooring, doors and doorways, electrical systems, boilers, ducts, plumbing, elevators: all of it, gone. The redevelopment also included the excavation and construction of additional underground parking, the re-orientation of the entrance, and construction of vehicular access to the new entrance.

[6] After the retrofit, the property remained a hotel with essentially the same number of rooms and gross floor area. There was no change to the structural integrity of the building or to its foundations. As a result of the redevelopment and reconstruction undertaken, the respondent Municipal Property As-sessment Corporation increased the 1993 cur-rent value assessment of the property for the 2000 taxation year from $12,773,000 to $37,375,000.

[7] The cost of redevelopment of the existing structure was approximately $39 million, whereas the cost of a complete demolition and rebuild would have been $36.8 million. However, by not demolishing the existing structure, the appellant was able to complete the project five months sooner and to maintain the hotel's status as a non-conforming use, allowing it to keep existing set-backs and to exceed the maximum gross floor area under the otherwise applicable municipal zoning by-law. Had the hotel been demolished and rebuilt, the property would have lost its non-conforming status, and it is not clear that the City of Toronto's committee of adjustments would have approved the variances that would have been required.

[8] The appellant described the redevelopment in its May 28, 1998 building permit application in the following terms: "Make interior alterations and alter fascades [sic] on north and south towers, make repairs in parking garage, additions at first floor level and build new underground parking garage under surface parking lot."

THE LEGISLATION

[9] In 1998, amendments to the **Municipal Act**, R.S.O. 1990, c. M-45 (the "**Act**"), changed the municipal tax regime in Ontario to a system based on current value of properties. To alleviate sudden and drastic shifts in taxation for properties in the commercial, industrial, and multi-residential tax classes, Part XXII.1 of the **Act** established a complex scheme of caps and claw-backs, the effect of which was to preserve certain historical inequities from the old regime.

[10] I set out here the key statutory provisions relevant to this appeal.

> "447.10(1) **Increases in assessment** - This section sets out the changes to be made to the frozen assessment listing for 1999 or 2000 if the assessment of a property to which this Part applies, as set out in the assessment roll for that year, as most recently revised, increases from the assessment set out in the assessment roll for the previous year as a result of,
>
> (a) an assessment made during the previous year under subsection 33(1) of the Assessment Act; or
>
> (b) an adjustment made on the assessment roll for the year as a result of the erection, alteration, enlargement or improvement of a building, a structure, machinery, equipment or a fixture that occurred during a previous year. 1998, c. 3, s. 30, part; 1999, c. 9, s. 156 (1).
>
> "(2) **Changes to frozen assessments.** - The assessments, referred to in subsection 447.5(4), in the frozen assessment listing for the year shall be changed as follows:
>
> 1. The total assessment shall be increased so that it equals the assessment set out in the assessment roll for the year multiplied by a factor prescribed in the regulations unless subsection (3) applies, in which case the total assessment shall be increased by the amount determined under that subsection.
>
> 2. The commercial assessment shall be increased by the same amount the total assessment was increased by under paragraph 1.
>
> 3. The business assessment shall be increased by the increase in the commercial assessment multiplied by the average business rate determined under section 447.13.
>
> "(3) **Special rule for alterations, etc.** - If the assessment of the property is increased as a result of the alteration, enlargement or improvement of any building, structure, machinery, equipment or fixture or any portion thereof, the total assessment shall be increased under paragraph 1 of subsection (2) by an amount determined in accordance with the following:
>
> *Amount = (Increase in assessment/ Old assessment) x Frozen asessment*
>
> Where,
>
> 'Increase in assessment' means the increase in the assessment on the assessment roll;
>
> 'Old assessment' means the assessment on the assessment roll before the increase;
>
> 'Frozen assessment' means the total assess-

ment on the frozen assessment listing.

. . . . .

"447.34.1(1) **Cap for new properties.** - The purpose of this section is to ensure that eligible properties are taxed in 2000 under this Part at a level of assessment that is no higher than that of comparable properties.

"(2) **Total assessment of eligible property for 2000.** - Despite any other requirement of this Part, the total assessment on the frozen assessment listing of an eligible property for 2000 under this Part shall be the lesser of,

(a) the amount determined for the year or part of the year under this section; and

(b) the amount determined for the year or part of the year under this Part, but for the application of this section.

. . . . .

"(16) **Definitions.** - In this section,

. . . . .

'eligible property' means a property to which subsection 447.10(2),

(a) first applied for 1998 and 1999 and continues to apply for 2000, or

(b) applies for 2000 and did not apply for 1999."

[11] The **Act** requires municipalities to maintain a "frozen assessment listing" for each property subject to Part XXII.1. The frozen assessment listing was equal to the total tax liability of a property as at December 31, 1997 and formed the base upon which property taxes were to be calculated. As taxes were essentially frozen, a mechanism was required to capture increased taxes resulting from physical changes to a property.

[12] In 2000, s. 447.34.1 was enacted to ensure that certain eligible properties were taxed at a level of assessment no higher than that of comparable properties. "Eligible property" is defined in s. 447.34.1 as property to which s. 447.10(2) applies for certain specified years. Section 447.10 provides for adjustments to assessment arising "as a result of the erection, alteration, enlargement or improvement of a building". Section 447.10(3) provides a special rule for increases resulting from the alteration, enlargement, or improvement of a building but specifically not to the "erection" of a building, leaving increases resulting from the "erection" of a building to be dealt with under s. 447.10(2). Therefore, s. 447.10(3), but not s. 447.10(2), applies to buildings that have been altered, enlarged, or improved. Accordingly, under the definition in s. 447.34.1(16), which is contingent on the applicability of s. 447.10(2), buildings that have been altered, enlarged, or improved would not count as "eligible property" and do not get the benefit of the 2000 amendments.

[13] It was common ground both here and before the application judge that the net effect of these provisions is that under s. 447.34.1, the subject property would fall within the class of eligible properties and thereby benefit from the 2000 amendment allowing for an assessment reduction to that of comparable properties as if the hotel retrofit were considered the erection of a building and not the alteration, enlargement or improvement of a building.

ANALYSIS

[14] The legislation at issue here is admittedly complex, but in the end, we are confronted with a relatively straightforward issue of statutory interpretation: did the retrofit of the subject property amount to the "erection" of a building or the "alteration, enlargement or improvement" of a building? In **Québec (Communauté urbaine) et autres v. Corporation Notre-Dame de Bon-Secours**, [1994] 3 S.C.R. 3; 171 N.R. 161; 63 Q.A.C. 161, at 20, the Supreme Court of Canada summarized the rules applicable to the interpretation of tax legislation: (1) The interpretation of tax legislation should follow the ordinary rules of interpretation; (2) a legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach; (3) the teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions; (4) substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute; and (5) only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

[15] In that case, as in many other cases, the Supreme Court adopted and applied the basic principle stated by Driedger, **Construction of Statutes**, 2nd Ed. (Toronto: Butterworths, 1983) at p. 87: "... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

[16] Giving the language of this legislation its grammatical and ordinary sense, I fail to see how the retrofit of the subject property could be considered to be the erection of a building as opposed to its alteration, enlargement, or improvement. The appellant stripped the existing building to its barest structural core, but that structural core remained. No new structure was put up. Rather, the structural core of the existing building was refilled with a new interior and sheathed with a new exterior. To describe this process as the "erection" of a building would, in my opinion, give the word "erection" an unusual if not distorted meaning.

[17] While by no means on all fours with the present case, the decision of this court in **Trivest Developments Ltd. et al. v. Toronto (City)** (1986), 57 O.R.(2d) 799 (C.A.), affing. (1986), 54 O.R.(2d) 728 (H.C.), supports this "ordinary meaning" interpretation. The issue there was whether the corporate owner of two older apartment buildings had to get demolition permits for renovation work that would gut the buildings' interiors but leave their external walls and foundations intact. This court, affirming Smith, J.'s, decision that no demolition permit was required, stated at p. 800: "The discretion given to it in this regard [in relation to demolition permits] was limited to situations where a new building is to be erected in place of the building to be demolished, which was not this case."

[18] The appellant argues that after the old Westbury Hotel had been stripped to its core in 1999, but before the new interior and exterior work was done, there was a "structure" (which the appellant likens to an "enclosed silo"), but not a "building", on the subject property.

Completion of the retrofit converted that barren "structure" into a "building". That conversion from structure to building, argues the appellant, should be interpreted to amount to the erection of a building.

[19] I am unable to accept this submission. It suggests that we should decide the case by considering the status of the property at a point in time isolated from both the future and the past. In my view, that approach would not be consistent with the object and purpose of s. 447.34.1. That section deals with changes to the value of property, and changes can only be understood in terms of what came before and what followed. The teleological approach requires us to consider the entire history of this property with a view to determining whether it was erected and therefore an eligible property under the 2000 amendments to the **Act**.

[20] The appellant cannot, through what I consider to be a strained interpretation of the language of the **Act**, escape the awkward facts of the case. The old hotel was *not* completely dismantled. The appellant maintained throughout the retrofit the character and use of the property as a hotel for all purposes, including municipal by-laws. The retrofitted hotel was *not* built from the ground up but by rebuilding the non-structural elements of the old hotel.

[21] If there were any doubt on the question, it would surely be appropriate to take into account the manner in which the appellant itself characterized the retrofit. When asked by the municipality for a description of the project for building permit purposes, the appellant described the work as making interior alterations and altering the facades. As I have already noted, by not demolishing the existing building and erecting a new one, the appellant secured the benefit of maintaining the non-conforming use status of the building under the applicable municipal zoning by-laws. The appellant chose to characterize the retrofit in terms inconsistent with the position it now advances to gain that legal advantage from the municipality. While not determinative of the property tax assessment issue, the appellant's own description of the work is surely a factor that this court may consider. The appellant has offered no plausible reason why it should be allowed to describe the retrofit as interior renovations to gain an advantage under the applicable municipal by-laws, but as the erection of a new building to gain an assessment advantage.

[22] In the end, the appellant's plea essentially rests on the argument that unless the court interprets "erection" to include the retrofit, the appellant will suffer an unfair and inequitable property tax assessment. The appellant asserts that its assessment is dramatically higher than those pertaining to comparable properties in the same area and that the court should interpret the **Act** in a manner consistent with the fundamental principle of real property assessment and taxation that comparable properties should bear comparable tax burdens.

[23] I accept that to the extent permitted by its language, legislation dealing with real property assessment and taxation should be interpreted in a manner that achieves equity and fairness as between property owners. I also agree that through the complex weave of caps and exemptions, the legislature did have as its objective the creation of an equitable scheme of property tax assessment. Indeed, the legislature specifically stated in s. 447.34.1(1) that the purpose of the 2000 "eligible property" amendments was "to ensure that eligible properties are taxed in 2000 ... at a level of assessment that is no higher than

that of comparable properties."

[24] On the other hand, it is our job to interpret the legislation that the legislature has enacted. We are not at liberty to overcome or ignore legislative distinctions by applying some free-standing principle of fairness. The fairness and equity of the 2000 amendments is extended *only* to "eligible properties". Any unfairness is created by the very language of the legislation, which draws a distinction between the erection of buildings on the one hand and the alteration, enlargement, or improvement of buildings on the other. While the application of that distinction to the facts of this case certainly disfavours the appellant, as a court of law we cannot ignore, obliterate, or refuse to apply the language chosen by the legislature. The legislature decided to give the benefit of an assessment on the basis of comparable properties to some properties and to withhold that benefit from others. Absent constitutional infirmity in the legislation according a benefit to one class and withholding the same benefit from another, there is nothing a court can do to alleviate any unfairness.

CONCLUSION

[25] Accordingly, I would dismiss the appeal with costs to the respondent fixed at the amount agreed to by the parties, $5,000 inclusive of disbursements and G.S.T.

Appeal dismissed.

Editor: Jana A. Andersen/gs

Her Majesty The Queen (respondent)
v. O.T. (appellant)
(C40363)

Indexed As: R. v. O.T.

Ontario Court of Appeal
Doherty, Moldaver and Gillese, JJ.A.
April 22, 2005.

Summary:

The accused was convicted of the assault and sexual assault of his wife. He was sentenced to two years' imprisonment for the assault and six months concurrent for the sexual assault. He appealed conviction and sought leave to appeal sentence.

The Ontario Court of Appeal granted leave to appeal sentence and dismissed the appeal from both conviction and sentence.

Criminal Law - Topic 5861

Sentence - Assault - The accused was convicted of the assault and sexual assault of his wife - The accused's wife alleged that he threw her down two flights of stairs and choked and kicked her - The sexual assault (rape) was alleged to have occurred after she confronted him about his alleged unfaithfulness - The trial judge sentenced the accused to two years' imprisonment for the assault and six months concurrent for the sexual assault - The Ontario Court of Appeal held that while it might have imposed the greater sentence on the sexual assault charge, the total sentence of two years was fit - See paragraphs 25 to 27.

Criminal Law - Topic 5932

Sentence - Sexual assault - [See **Criminal**

TAB 2

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Corporation Notre-Dame de Bon-Secours *Appellant*

v.

Communauté urbaine de Québec and City of Québec *Respondents*

and

Bureau de révision de l'évaluation foncière du Québec *Respondent*

and

The Attorney General of Quebec *Respondent*

INDEXED AS: QUÉBEC (COMMUNAUTÉ URBAINE) *v.* CORP. NOTRE-DAME DE BON-SECOURS

File No.: 23014.

1994: May 25; 1994: September 30.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Municipal law — Real estate valuation — Tax-exempt immovables — Reception centres — Whether appellant can qualify as reception centre and benefit from tax exemption — Interpretation of tax legislation — Act respecting Municipal Taxation, R.S.Q., c. F-2.1, s. 204(14) — Act respecting Health Services and Social Services, R.S.Q., c. S-5, ss. 1(k), 12.

Taxation — Legislation — Rules for interpreting tax legislation.

The appellant is a non-profit corporation created in 1964 for the purpose of providing low rental housing to indigent elderly persons. There are over 450 residents at the appellant's facilities, which have been in operation since 1969. Of this total, 20 are located in the shelter section, for which the appellant holds a permit issued pursuant to the *Act respecting Health Services and Social Services* ("*A.H.S.S.S.*"). This permit authorizes it

La Corporation Notre-Dame de Bon-Secours *Appelante*

c.

La Communauté urbaine de Québec et la ville de Québec *Intimées*

et

Le Bureau de révision de l'évaluation foncière du Québec *Intimé*

et

Le procureur général du Québec *Intimé*

RÉPERTORIÉ: QUÉBEC (COMMUNAUTÉ URBAINE) *c.* CORP. NOTRE-DAME DE BON-SECOURS

N° du greffe: 23014.

1994: 25 mai; 1994: 30 septembre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit municipal — Évaluation foncière — Immeubles exempts de taxes — Centres d'accueil — L'appelante peut-elle se qualifier comme centre d'accueil et bénéficier d'une exemption fiscale? — Interprétation des lois fiscales — Loi sur la fiscalité municipale, L.R.Q., ch. F-2.1, art. 204(14) — Loi sur les services de santé et les services sociaux, L.R.Q., ch. S-5, art. 1k), 12.

Droit fiscal — Législation — Règles d'interprétation des lois fiscales.

L'appelante est une corporation sans but lucratif établie en 1964 dans le but de fournir des logements à loyer modique aux personnes âgées peu fortunées. En opération depuis 1969, les installations de l'appelante abritent plus de 450 résidents. De ce total, 20 résidents sont regroupés dans la section hébergement pour laquelle l'appelante détient un permis délivré en vertu de la *Loi sur les services de santé et les services sociaux*

to operate a private reception centre for 20 persons. The government pays part of their room and board and exercises a measure of control to ensure that all the places in the shelter section are filled. The remainder of the facilities receive no government grant and are managed entirely by the appellant. The services offered are provided for all residents and the premises in general are designed to meet the special needs of the elderly. The criteria for admission are a minimum age of 60, a low income and physical and psychological autonomy. In 1982 an assessor found that 89 percent of the total area of the property was reserved for apartments and that the shelter section and the community services took up 11 percent. He therefore gave the appellant a real estate tax exemption for 1980 to 1984 of 11 percent. The appellant claimed the reception centre exemption provided for in s. 204(14) of the *Act respecting Municipal Taxation* ("*A.M.T.*") for all its facilities, in view of the nature of its mission, and filed a complaint with the Bureau de révision de l'évaluation foncière du Québec ("BREF"). The BREF allowed its complaint and found that the appellant's activities are those of a reception centre and exempted its facilities from all real estate taxes for 1980 to 1984. The Provincial Court affirmed that decision but the Court of Appeal reversed the judgment of the Provincial Court and held that the exemption did not apply to 89 percent of the appellant's surface area.

Held: The appeal should be allowed.

The principles that should guide the courts in interpreting tax legislation are as follows: (1) The interpretation of tax legislation is subject to the ordinary rules of interpretation; (2) A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent; (3) This teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions; (4) Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute; (5) Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

(«*L.S.S.S.S.*»). Ce permis l'autorise à exploiter un centre d'accueil privé pouvant accueillir 20 personnes. L'État assume une partie de leur pension et exerce un certain contrôle pour s'assurer que toutes les places de la section hébergement sont occupées. Le reste des installations ne fait l'objet d'aucune subvention gouvernementale et est entièrement géré par l'appelante. Les services offerts sont à la disposition de tous les résidents et les lieux sont aménagés, dans leur ensemble, pour répondre aux besoins particuliers des personnes âgées. Les critères d'admission sont l'âge minimum de 60 ans, la modicité des revenus ainsi que l'autonomie physique et psychologique. En 1982, un évaluateur constate que 89 pour 100 de la superficie totale de l'immeuble est réservée à des logements et que la section hébergement et les services communautaires en occupent 11 pour 100. Il accorde donc à l'appelante une exemption de taxes foncières de 11 pour 100 pour les années 1980 à 1984. L'appelante prétend bénéficier de l'exemption relative au centre d'accueil prévue au par. 204(14) de la *Loi sur la fiscalité municipale* («*L.F.M.*») pour l'ensemble de ses installations, étant donné la nature de sa vocation, et porte plainte devant le Bureau de révision de l'évaluation foncière du Québec («BREF»). Le BREF accueille sa plainte et conclut que les activités de l'appelante sont celles d'un centre d'accueil et exempte ses installations de toute taxe foncière pour les années 1980 à 1984. La Cour provinciale confirme cette décision mais la Cour d'appel infirme le jugement de la Cour provinciale et déclare que, pour 89 pour 100 de sa superficie, l'exemption ne s'applique pas à l'appelante.

Arrêt: Le pourvoi est accueilli.

Les principes qui doivent guider les tribunaux dans l'interprétation des lois fiscales sont les suivants: (1) L'interprétation des lois fiscales est soumise aux règles ordinaires d'interprétation; (2) Qu'une disposition législative reçoive une interprétation stricte ou libérale sera déterminé par le but qui la sous-tend, qu'on aura identifié à la lumière du contexte de la loi, de l'objet de celle-ci et de l'intention du législateur; (3) Que cette approche téléologique favorise le contribuable ou le fisc dépendra uniquement de la disposition législative en cause et non de l'existence de présomptions préétablies; (4) Primauté devrait être accordée au fond sur la forme dans la mesure où cela est compatible avec le texte et l'objet de la loi; (5) Seul un doute raisonnable et non dissipé par les règles ordinaires d'interprétation sera résolu par le recours à la présomption résiduelle en faveur du contribuable.

In light of these rules of interpretation, the appellant may benefit from the tax exemption provided for in s. 204(14) *A.M.T.* for all its facilities. First, on the facts found by the BREF the appellant's facilities can be classified in their entirety as a reception centre within the meaning of ss. 1(*k*) and 12(*b*) *A.H.S.S.S.* To be treated as a reception centre an establishment must first offer certain services; it must then place these services at the disposal of persons whose condition requires them. Lodging is a service sufficient in itself to meet the requirements of the "services" part of the definition in s. 1(*k*). It is not necessary to offer the full range of services enumerated in that paragraph. For the "need" part, age is sufficient as such to justify a need to be treated or kept in a protected residence, regardless of any physical, personality, psycho-social or family deficiency. The notion of care cannot be limited to a purely therapeutic aspect. As to the concept of a protected residence in s. 1(*k*), for which no definition is given in the *A.H.S.S.S.*, it should not be given a narrower meaning than that of a residence providing a secure location adapted to the special physical and mental needs of the people for whom it was designed and whom it serves. Second, the appellant's entire facilities are used for the purposes provided by the *A.H.S.S.S.*, as stipulated by s. 204(14). Just as the autonomy of elderly persons at the time of their admission cannot be the decisive test in determining the concept of need provided for in s. 1(*k*), it also cannot be used to determine whether the appellant's facilities are being used for the purposes provided by the *A.H.S.S.S.* The answer to that question will depend entirely on the finding that in fact these facilities are designed and adapted for accommodating the elderly with a real need, though that need may be variable in degree or immediacy. Here the BREF found that the services provided by the appellant, taken together with the needs of its residents, lead to the conclusion that it must be classified in its entirety as a reception centre for the purposes of the *A.H.S.S.S.* Though aware of the existence of s. 2 *A.M.T.*, which allows the assessment unit to be divided, the BREF nevertheless considered that the appellant was operating facilities which as a whole met the two parts of the definition of a reception centre. The decision of the BREF, a specialized tribunal, discloses no error subject to review on appeal. Finally, a reception centre may be exempt from real estate taxes even if it does not hold a permit

À la lumière de ces principes d'interprétation, l'appelante peut bénéficier, pour l'ensemble de ses installations, de l'exemption fiscale prévue au par. 204(14) *L.F.M.* D'une part, la totalité des installations de l'appelante, selon les faits constatés par le BREF, peut être qualifiée de centre d'accueil au sens des al. 1*k*) et 12*b*) *L.S.S.S.S.* Pour être considéré comme un centre d'accueil, un établissement doit d'abord offrir certains services; il doit ensuite mettre ces services à la disposition de personnes dont l'état le requiert. Le logement est un service suffisant en lui-même pour répondre aux exigences du volet «services» de la définition de l'al. 1*k*). Il n'est pas nécessaire d'offrir la gamme entière des services énumérés à cet alinéa. Quant au volet «besoin», l'âge est suffisant en tant que tel pour justifier un besoin d'être soigné ou gardé en résidence protégée, et ce, indépendamment de toute déficience physique, caractérielle, psychosociale ou familiale. La notion de soins ne saurait être restreinte à une dimension purement thérapeutique. Quant au concept de résidence protégée à l'al. 1*k*), pour lequel on ne trouve pas de définition dans la *L.S.S.S.S.*, il ne devrait pas recevoir d'acception plus étroite que celle de résidence offrant un cadre sécuritaire adapté aux besoins physiques et moraux particuliers de la population pour laquelle elle a été conçue et qu'elle dessert. D'autre part, l'ensemble des installations de l'appelante sert aux fins prévues par la *L.S.S.S.S.*, comme le prescrit le par. 204(14). Tout comme l'autonomie des personnes âgées au moment de leur admission ne saurait être le critère déterminant pour évaluer la notion de besoin prévue à l'al. 1*k*), on ne peut non plus s'en prévaloir pour décider si les installations de l'appelante servent aux fins prévues par la *L.S.S.S.S.* La réponse à cette question repose entièrement sur la constatation que dans les faits, ces installations sont conçues et adaptées pour recevoir des personnes âgées dont le besoin est réel même s'il peut être variable, en degré ou en imminence. En l'espèce, le BREF a constaté que les services offerts par l'appelante, conjugués aux besoins de ses résidents, font en sorte que cette dernière doit être entièrement qualifiée de centre d'accueil aux yeux de la loi. Conscient de l'existence de l'art. 2 *L.F.M.*, qui permet de scinder l'unité d'évaluation, le BREF a néanmoins estimé que l'appelante exploitait des installations qui, globalement, répondaient aux deux volets de la définition de centre d'accueil. La décision du BREF, tribunal spécialisé, ne fait pas voir

required by the *A.H.S.S.S.* Similarly, there is nothing to indicate that failure to observe the requirement provided for in s. 18.1 *A.H.S.S.S.* — submission of admission criteria to the Conseil régional de la santé et des services sociaux or the Minister responsible, for approval — will as such affect the status of an establishment as a reception centre. The decision of the BREF must therefore be restored.

d'erreur susceptible de fonder réformation en appel. Enfin, un centre d'accueil peut être exempt de taxes foncières même s'il n'est pas détenteur du permis exigé par la *L.S.S.S.S.* De même, rien n'indique que le défaut d'un établissement de respecter l'exigence prévue à l'art. 18.1 *L.S.S.S.S.* — soumission pour approbation des critères d'admission au Conseil régional de la santé et des services sociaux ou au Ministre responsable — affecte en soi le statut de centre d'accueil d'un établissement. La décision du BREF doit donc être rétablie.

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Distinguished: *Services de santé et services sociaux — 7*, [1987] C.A.S. 579; **referred to:** *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *The Queen v. Golden*, [1986] 1 S.C.R. 209; *Ville de Montréal v. ILGWU Center Inc.*, [1974] S.C.R. 59; *Johns-Manville Canada Inc. v. The Queen*, [1985] 2 S.C.R. 46; *The Queen v. Imperial General Properties Ltd.*, [1985] 2 S.C.R. 288; *Bronfman Trust v. The Queen*, [1987] 1 S.C.R. 32; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Ville de Québec v. Corp. Notre-Dame de Bon-Secours*, Prov. Ct. Québec, No. 200-02-008522-793, November 27, 1980, unreported.

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Act respecting Municipal Taxation, R.S.Q., c. F-2.1, ss. 2, 204(14) [repl. 1980, c. 34, s. 27], (15).

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Lois et règlements cités

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Loi sur les services de santé et les services sociaux, L.R.Q., ch. S-5, art. 1*a*) [mod. 1981, ch. 22, art. 40], *b*), *c*), *k*) [rempl. 1979, ch. 85, art. 82], 3, 9, 10 [mod. 1981, ch. 22, art. 41], 11, 12*a*), *b*), 18.1 [aj. *idem*, art. 43; mod. 1983, ch. 54, art. 72], 76, 82 [rempl. 1981, ch. 22, art. 63].

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APPEAL from a judgment of the Quebec Court of Appeal, [1993] R.L. 68, 47 Q.A.C. 47, reversing a judgment of the Provincial Court rendered on May 19, 1987, affirming a decision of the Bureau

POURVOI contre un arrêt de la Cour d'appel du Québec, [1993] R.L. 68, 47 Q.A.C. 47, qui a infirmé un jugement de la Cour provinciale rendu le 19 mai 1987, qui avait confirmé une décision du

de révision de l'évaluation foncière du Québec, [1985] B.R.E.F. 130. Appeal allowed.

André Bois and *André Lemay*, for the appellant.

Estelle Alain, for the respondents the Communauté urbaine de Québec and the City of Québec.

No one appeared for the respondent the Bureau de révision de l'évaluation foncière du Québec.

Alain Tanguay, for the respondent the Attorney General of Quebec.

English version of the judgment of the Court delivered by

GONTHIER J. — The issue in this case is whether the appellant, an institution devoted to the welfare of elderly persons living under the poverty line, may benefit from the tax exemption provided for in s. 204(14) of the *Act respecting Municipal Taxation*, R.S.Q., c. F-2.1 ("*A.M.T.*") for all its facilities. There are two main questions: (1) What are the principles that should guide the courts in interpreting tax legislation? (2) In light of these principles, can the appellant qualify as a reception centre within the meaning of s. 12 of the *Act respecting Health Services and Social Services*, R.S.Q., c. S-5 ("*A.H.S.S.S.*"), referred to in s. 204(14) *A.M.T.*?

I — Facts

The appellant, the Corporation Notre-Dame de Bon-Secours, is a non-profit corporation created in 1964 for the purpose of providing low rental housing to indigent elderly persons. On June 16, 1967 the Sœurs de la Congrégration de Notre-Dame conveyed to the appellant for one dollar the land on which it would erect the facilities for use in carrying out its mission, facilities to be known as "La Champenoise" (which we will use to refer to the appellant). Its construction began in 1968 and it was officially opened in November 1969.

Bureau de révision de l'évaluation foncière du Québec, [1985] B.R.E.F. 130. Pourvoi accueilli.

André Bois et *André Lemay*, pour l'appelante.

Estelle Alain, pour les intimées la Communauté urbaine de Québec et la ville de Québec.

Personne n'a comparu pour l'intimé le Bureau de révision de l'évaluation foncière du Québec.

Alain Tanguay, pour l'intimé le procureur général du Québec.

Le jugement de la Cour a été rendu par

LE JUGE GONTHIER — Il s'agit en l'espèce de savoir si l'appelante, une institution vouée au bien-être des personnes âgées vivant sous le seuil de la pauvreté, peut bénéficier de l'exemption fiscale prévue au par. 204(14) de la *Loi sur la fiscalité municipale*, L.R.Q., ch. F-2.1 («*L.F.M.*»), pour l'ensemble de ses installations. Deux questions principales se posent: (1) Quels sont les principes qui doivent guider les tribunaux dans l'interprétation des lois fiscales? (2) À la lumière de ces principes, l'appelante peut-elle se qualifier comme centre d'accueil au sens de l'art. 12 de la *Loi sur les services de santé et les services sociaux*, L.R.Q., ch. S-5 («*L.S.S.S.S.*»), auquel le par. 204(14) *L.F.M.* renvoie?

I — Les faits

L'appelante, Corporation Notre-Dame de Bon-Secours, est une corporation sans but lucratif établie en 1964 et dont l'objectif est de fournir des logements à loyer modique aux personnes âgées peu fortunées. Le 16 juin 1967, les Sœurs de la Congrégation de Notre-Dame cèdent à l'appelante pour la somme de 1 $ le terrain sur lequel seront érigées les installations qui lui permettront d'accomplir sa mission et seront connues sous le nom de «La Champenoise» (que nous employons pour désigner l'appelante). Sa construction débute en 1968 et son ouverture officielle a lieu en novembre 1969.

There are 456 people at La Champenoise, with an average age of 83. The residents' annual income varies between $6,000 and $9,000 and 80 percent of the people at the establishment are women. Of the total number of residents, 20 are physically located in a single sector of the establishment known as the shelter section, for which La Champenoise holds a permit issued pursuant to the *A.H.S.S.S.* authorizing it to operate a private reception centre for 20 residents. The shelter section apartments are similar to those of other residents, except that they have no kitchenette. Part of the room and board of the residents of this section is borne by the government, which pays a *per diem* allowance. The government also exercises a measure of control to ensure that the 20 places are filled. The remainder of the facilities receive no government grant and are managed entirely by La Champenoise. Its administrators and managers work as volunteers.

In addition to the services of a resident priest, the chapel, an infirmary which is accessible 24 hours a day, the cafeteria and the social activities which La Champenoise provides for all residents, it should also be noted that the premises in general are physically designed to meet the special needs of the elderly. Thus, *inter alia*, there are ramps, there are no door sills, electrical outlets are 24 inches from the ground and bathrooms are equipped with support bars.

The criteria for admission to La Champenoise are a minimum age of 60, a low income and physical and psychological autonomy. The latter factor is not, however, a requirement for staying on in the establishment, since it appears that elderly persons may remain in the premises despite a subsequent deterioration in their health. In his testimony given in 1984 the director general of La Champenoise noted that places which became vacant were offered to applicants who had made their applications for admission in 1976: there was a considerable waiting list of 1,800 persons.

La Champenoise abrite 456 personnes dont l'âge moyen est de 83 ans. Le revenu annuel des résidents oscille entre 6 000 $ et 9 000 $ et la population de l'établissement est féminine à 80 pour 100. Du nombre total des résidents, 20 personnes sont physiquement regroupées dans un même secteur de l'établissement appelé la section hébergement, pour laquelle La Champenoise détient un permis délivré en vertu de la *L.S.S.S.S.*, qui l'autorise à exploiter un centre d'accueil privé pouvant accueillir 20 bénéficiaires. Les appartements de la section hébergement sont semblables à ceux des autres résidents, à la différence qu'on n'y retrouve pas de cuisinette. Les bénéficiaires de cette section voient une partie de leur pension assumée par l'État qui verse un *per diem*. L'État exerce également un certain contrôle pour s'assurer que les 20 places sont occupées. Le reste des installations ne fait l'objet d'aucune subvention gouvernementale et est entièrement géré par La Champenoise. Ses administrateurs et dirigeants y travaillent d'ailleurs bénévolement.

Outre les services d'un prêtre résident, la chapelle, l'infirmerie accessible 24 heures sur 24, la cafétéria et les activités sociales, que La Champenoise met à la disposition de tous les résidents, on note que les lieux sont physiquement aménagés, dans leur ensemble, pour répondre aux besoins particuliers des personnes âgées. C'est ainsi, notamment, qu'on y retrouve des rampes d'accès, que les seuils de porte sont absents, que les prises de courant se situent à 24 pouces du sol et que les salles de bain sont pourvues de barres d'appui.

Les critères d'admission à La Champenoise sont l'âge minimum de 60 ans, la modicité des revenus ainsi que l'autonomie physique et psychologique. Ce dernier élément n'est toutefois pas un critère de maintien dans l'établissement, puisqu'il appert que les personnes âgées peuvent demeurer dans les lieux en dépit d'une détérioration subséquente de leur état de santé. Lors de son témoignage, rendu en 1984, le directeur général de La Champenoise souligne que les places qui se libèrent sont offertes à des postulants qui avaient fait leur demande d'admission en 1976; il y avait, en effet, une imposante liste d'attente de 1 800 personnes.

In 1982 an assessor from the Communauté urbaine de Québec visited La Champenoise to determine the proportion of the premises used as an apartment building and as a reception centre. He found that 89 percent of the total area of the property was reserved for apartments and that the shelter section and the community services took up 11 percent: he gave La Champenoise a real estate tax exemption for 1980 to 1984 only for this 11 percent. La Champenoise filed a complaint with the Bureau de révision de l'évaluation foncière du Québec ("BREF"), in which it claimed an exemption for all its facilities in view of the nature of its mission.

The real estate tax debt to date amounts to over $4.5 million and it goes without saying that the size of the amounts involved will have a determining effect on the viability of La Champenoise and the security of its 456 elderly residents.

II — The Courts Below

Bureau de révision de l'évaluation foncière du Québec, [1985] B.R.E.F. 130

According to the respondents the City of Québec and the Communauté urbaine de Québec, holding a permit to operate a reception centre is an essential condition for benefiting from the tax exemption. It follows that as La Champenoise only holds a permit for 20 residents its entire facilities cannot be regarded as a reception centre. After reviewing the testimony and the applicable provisions of the *A.H.S.S.S.*, Mr. Barbe, of the BREF, found that the activities of La Champenoise are those of a reception centre and that it was not necessary for it to hold a permit in order to be treated as such. He accordingly exempted the appellant's property from all real estate taxes.

Provincial Court (District of Québec, No. 200-02-004152-858, May 19, 1987)

Aubé Prov. Ct. J. concurred in the findings of the BREF. He was of the view that the entire La Champenoise property constitutes a reception cen-

En 1982, un évaluateur de la Communauté urbaine de Québec visite La Champenoise en vue d'établir la proportion des lieux servant d'immeuble à appartements et de centre d'accueil. Il constate que 89 pour 100 de la superficie totale de l'immeuble est réservée à des logements et que la section hébergement et les services communautaires en occupent 11 pour 100; il accorde à La Champenoise une exemption de taxes foncières dans cette seule proportion de 11 pour 100 pour les années 1980 à 1984. La Champenoise porte plainte devant le Bureau de révision de l'évaluation foncière du Québec («BREF») où elle prétend bénéficier de l'exemption pour l'ensemble de ses installations, étant donné la nature de sa vocation.

À ce jour, la dette en taxes foncières s'établit à plus de 4,5 millions de dollars et il va sans dire que l'importance des montants en jeu est déterminante pour la viabilité de La Champenoise et la sécurité de ses 456 pensionnaires âgés.

II — Les décisions des instances dont appel

Bureau de révision de l'évaluation foncière du Québec, [1985] B.R.E.F. 130

Selon la ville de Québec et la Communauté urbaine de Québec, intimées, la détention d'un permis autorisant à exploiter un centre d'accueil est une condition essentielle pour bénéficier de l'exemption fiscale. Il s'ensuit que La Champenoise, ne détenant de permis que pour 20 bénéficiaires, ne peut être considérée comme un centre d'accueil pour l'ensemble de ses installations. Après examen des témoignages et des dispositions applicables de la *L.S.S.S.S.*, Me Barbe, du BREF, conclut que les activités de La Champenoise sont celles d'un centre d'accueil et qu'il n'est pas nécessaire de détenir un permis pour être considéré comme tel. Il exempte donc l'immeuble de l'appelante de toute taxe foncière.

Cour provinciale (district de Québec, nº 200-02-004152-858, 19 mai 1987)

Le juge Aubé partage les conclusions du BREF. Il estime que l'immeuble de La Champenoise, dans sa totalité, constitue un centre d'accueil au sens de

tre within the meaning of s. 1(*k*) *A.H.S.S.S.* and is used for the purposes provided by the Act. He took note of the parties' admission that the shelter section meets the conditions for the exemption provided for in s. 204(14) *A.M.T.* He also noted the presence of s. 2 *A.M.T.*, which allows an assessment unit to be divided. In light of these observations, he nevertheless stated, at p. 12 of his reasons:

[TRANSLATION] The evidence here is clear, however, that La Champenoise in fact forms a single well-integrated unit and that there is a direct, permanent and necessary connection between the shelter section and the rest of La Champenoise.

In the presence of such a well-established and well-articulated overall reality, the court could not allow technical considerations to obscure the true nature of La Champenoise, namely that of a facility at which, for all practical purposes, all services are available to everyone.

The BREF's decision was upheld.

Quebec Court of Appeal (1992), 47 Q.A.C. 47

In the opinion of Bisson C.J.Q., the outcome of the case depended on the answer to two questions. First, the nature of La Champenoise had to be determined. After examining certain definitions included in the *A.H.S.S.S.*, including that of a "reception centre", Bisson C.J.Q. finally concluded, at p. 55, that [TRANSLATION] "[t]he legal and factual existence of the respondent [La Champenoise] is far from establishing that it meets the definition of a reception centre, except with respect to the shelter section". He also noted that the solution of the matter had to be based on more fundamental questions than whether or not a permit was held, and so he did not consider it necessary to rule on the point.

The second question was to determine whether the property was used for the purposes provided by the *A.H.S.S.S.* To decide whether the La Champenoise facilities were used as a reception centre strictly speaking, Bisson C.J.Q. considered in particular the criteria for admission to the establishment. He noted that the evidence presented as to the La Champenoise admission criteria indicated

l'al. 1*k*) *L.S.S.S.S.* et qu'il sert aux fins prévues par cette loi. Il prend note de l'aveu des parties que la section hébergement remplit les conditions pour bénéficier de l'exemption prévue au par. 204(14) *L.F.M.* Il constate également la présence de l'art. 2 *L.F.M.* qui permet de scinder une unité d'évaluation. À la lumière de ces observations, il affirme néanmoins, à la p. 12 de ses motifs:

Mais la preuve est claire, ici, que la Champenoise, dans les faits, ne forme qu'une seule unité bien intégrée et qu'il y a un lien direct, permanent et nécessaire entre la section hébergement et le reste de la Champenoise.

En présence d'une réalité globale aussi bien établie et précisée, le Tribunal ne saurait faire prévaloir des réalités techniques qui empêcheraient de voir le vrai visage de la Champenoise, soit celui d'une installation où, à toutes fins pratiques, tous les services sont accessibles à tout le monde.

La décision du BREF est maintenue.

Cour d'appel du Québec (1992), 47 Q.A.C. 47

De l'avis du juge en chef Bisson, le sort du litige dépend de la réponse apportée à deux questions. Il faut d'abord déterminer la nature de La Champenoise. De l'examen de certaines définitions incluses dans la *L.S.S.S.S.*, dont celle de «centre d'accueil», le juge en chef Bisson tire la conclusion ultime, à la p. 55, que «[l']existence juridique et factuelle de l'intimée [La Champenoise] est loin de faire voir qu'elle répond à la définition du Centre d'accueil, sauf pour le secteur hébergement». Il souligne également que la solution du litige doit reposer sur des éléments plus fondamentaux que la détention ou non d'un permis et, à ce titre, n'estime pas nécessaire de se prononcer sur le sujet.

La deuxième question consiste à déterminer si l'immeuble sert aux fins prévues par la *L.S.S.S.S.* Pour examiner si les installations de La Champenoise servent à proprement parler de centre d'accueil, le juge en chef Bisson se penche particulièrement sur les critères d'admission de l'établissement. Il souligne que la preuve fournie quant aux critères d'admission à La Champenoise

that they did not meet the requirements of the definition of a reception centre. In the opinion of the Chief Justice, at p. 56, there had been an error in characterizing the facts:

[TRANSLATION] Where the error was made was in making the availability of community services the test by which La Champenoise was regarded as a reception centre.

The fact that these community services are available to all residents — tenants and sheltered persons — does not mean that the residents are all in a condition, "by reason of their age or their physical, personality, psycho-social or family deficiencies, . . . such that they must be treated, kept in protected residence or . . ." (s. 1(k)).

I note that the evidence showed that in order to obtain an apartment at La Champenoise residents had to be autonomous physically as well as mentally and financially, though in the latter case with limited means.

Finally, since the issue is whether to apply an exemption to the principle of real estate taxation, Bisson C.J.Q. was in favour of adopting a restrictive interpretation. With this in mind, he concluded at p. 56:

[TRANSLATION] It is true that the respondent [La Champenoise] is a non-profit corporation and engaged in an eminently praiseworthy undertaking, but this is not a basis for an interpretation that conflicts with the purpose contemplated by the legislature when it created the exemption.

I therefore conclude that 89 percent of the surface area of the property occupied by La Champenoise . . . was not used for the purpose provided in the [*A.H.S.S.S.*], and that proportion of it could not be regarded as a reception centre.

Bisson C.J.Q. accordingly applied s. 2 *A.M.T.*, which allows a unit of assessment to be divided, and held that the exemption provided for in s. 204(14) of that Act did not apply to 89 percent of the surface area of La Champenoise.

III — Issues

To determine whether La Champenoise may benefit from the tax exemption provided for in

démontre que ceux-ci ne répondent pas aux impératifs de la définition de centre d'accueil. De l'avis du Juge en chef, à la p. 56, il y a eu erreur dans la qualification des faits:

Là où l'erreur a été commise, c'est de faire de l'accessibilité aux services communautaires le critère qui ferait de La Champenoise un centre d'accueil.

Le fait que ces services communautaires soient accessibles à tous les résidents — locataires et hébergés — ne fait pas en sorte que toutes ces personnes sont dans un état qui, «en raison de leur âge ou de leurs déficiences physiques, caractérielles, psychosociales ou familiales, est tel qu'elles doivent être soignées, gardées en résidence protégée ou (. . .)» (article 1k)).

Je rappelle que la preuve a révélé que pour obtenir un logement à La Champenoise, il fallait être autonome aussi bien physiquement que mentalement et financièrement, dans ce dernier cas toutefois, de façon limitée.

Enfin, puisqu'il s'agit d'appliquer une exemption au principe de la taxation foncière, le juge en chef Bisson préconise l'adoption d'une interprétation restrictive. Dans cette perspective, il conclut à la p. 56:

Il est vrai que l'intimée [La Champenoise] est une corporation sans but lucratif et qui poursuit une œuvre éminemment louable mais ceci n'autorise pas une interprétation qui aille à l'encontre du but visé par le législateur lorsqu'il a décrété une exemption.

J'en viens donc à la conclusion que pour 89% de sa superficie, l'immeuble occupé par La Champenoise [. . .] ne servait pas aux fins prévues par la [*L.S.S.S.S.*], et qu'elle ne pouvait, pour cette proportion, être considérée comme un centre d'accueil.

Le juge en chef Bisson donne donc effet à l'art. 2 *L.F.M.*, qui permet le fractionnement de l'unité d'évaluation, et déclare que pour 89 pour 100 de sa superficie, l'exemption prévue au par. 204(14) de la même loi ne s'applique pas à La Champenoise.

III — Les questions en litige

Pour déterminer si La Champenoise peut, pour l'ensemble de ses installations, bénéficier de

s. 204(14) *A.M.T.* for all its facilities, the Court must answer the following two questions:

1. What are the principles that should guide the courts in interpreting tax legislation?

2. In light of these principles, can La Champenoise qualify as a reception centre within the meaning of s. 12 *A.H.S.S.S.*, referred to in s. 204(14) *A.M.T.*?

IV — Relevant Legislation

At the relevant times the *A.M.T.* provided the following:

2. Unless otherwise indicated by the context, any provision of this act which contemplates an immoveable property, moveable property or unit of assessment is deemed to contemplate part of such an immoveable property, moveable property or unit of assessment, if only that part falls within the scope of the provision.

204. The following are exempt from all municipal or school real estate taxes:

(14) an immoveable belonging to a public establishment within the meaning of the Act respecting health services and social services (chapter S-5), including a reception centre contemplated in section 12 of that act, used for the purposes provided by that act, and an immoveable belonging to the holder of a day care centre permit or nursery school permit contemplated in paragraph 1 or 2 of section 4 or 5 of the Act respecting child day care (chapter S-4.1), used for the purposes provided by that act;

The *A.H.S.S.S.* provided:

1. In this Act and the regulations, unless the context indicates a different meaning, the following expressions and words mean:

(*a*) "establishment": a local community service centre, a hospital centre, a social service centre or a reception centre;

(*b*) "public establishment": an establishment contemplated in sections 10 and 11;

l'exemption fiscale prévue au par. 204(14) *L.F.M.*, la Cour doit répondre aux deux questions suivantes:

1. Quels sont les principes qui doivent guider les tribunaux dans l'interprétation des lois fiscales?

2. À la lumière de ces principes, la Champenoise peut-elle se qualifier comme centre d'accueil au sens de l'art. 12 *L.S.S.S.S.* auquel le par. 204(14) *L.F.M.* renvoie?

IV — Les dispositions législatives pertinentes

Aux dates pertinentes au litige, la *L.F.M.* prévoyait ce qui suit:

2. À moins que le contexte n'indique le contraire, une disposition de la présente loi qui vise un immeuble, un meuble ou une unité d'évaluation est réputée viser une partie d'un tel immeuble, meuble ou unité d'évaluation, si cette partie seulement entre dans le champ d'application de la disposition.

204. Sont exempts de toute taxe foncière, municipale ou scolaire:

14° un immeuble appartenant à un établissement public au sens de la Loi sur les services de santé et les services sociaux (chapitre S-5), y compris un centre d'accueil visé à l'article 12 de cette loi, et qui sert aux fins prévues par cette loi, et un immeuble appartenant au titulaire d'un permis de service de garde en garderie ou en jardin d'enfants visé au paragraphe 1° ou 2° de l'article 4 ou 5 de la Loi sur les services de garde à l'enfance (chapitre S-4.1), et qui sert aux fins prévues par cette loi;

Quant à la *L.S.S.S.S.*, elle disposait:

1. Dans la présente loi et les règlements, à moins que le contexte n'indique un sens différent, les expressions et mots suivants signifient:

a) «établissement»: un centre local de services communautaires, un centre hospitalier, un centre de services sociaux ou un centre d'accueil;

b) «établissement public»: un établissement visé aux articles 10 et 11;

(*c*) "private establishment": an establishment contemplated in sections 12 and 13;

. . .

(*k*) "reception centre": facilities where in-patient, out-patient or home-care services are offered for the lodging, maintenance, keeping under observation, treatment or social rehabilitation, as the case may be, of persons whose condition, by reason of their age or their physical, personality, psycho-social or family deficiencies, is such that they must be treated, kept in protected residence or, if need be, for close treatment, or treated at home, including nurseries, but excepting day care establishments contemplated in the Act respecting child day care (chapter S-4.1), foster families, vacation camps and other similar facilities and facilities maintained by a religious institution to receive its members or followers;

3. The Minister shall exercise the powers that this Act confers upon him in order to:

(*a*) improve the state of the health of the population, the state of the social environment in which they live and the social conditions of individuals, families and groups;

. . .

(*c*) encourage the population and the groups which compose it to participate in the founding, administration and development of establishments so as to ensure their vital growth and renewal;

9. Every establishment is public or private.

10. The following are public establishments:

(*a*) every establishment constituted under this Act or resulting from an amalgamation or conversion made under this Act;

(*b*) every hospital centre or social service centre maintained by a non-profit corporation;

(*c*) every establishment using for its object immovable assets which are the property of a non-profit corporation other than a corporation incorporated under this Act.

11. Every reception centre maintained by a non-profit corporation other than a corporation contemplated in section 10 is also a public establishment, subject to section 12.

c) «établissement privé»: un établissement visé aux articles 12 et 13;

. . .

k) «centre d'accueil»: une installation où l'on offre des services internes, externes ou à domicile pour, le cas échéant, loger, entretenir, garder sous observation, traiter ou permettre la réintégration sociale des personnes dont l'état, en raison de leur âge ou de leurs déficiences physiques, caractérielles, psychosociales ou familiales, est tel qu'elles doivent être soignées, gardées en résidence protégée ou, s'il y a lieu, en cure fermée ou traitées à domicile, y compris une pouponnière, mais à l'exception d'un service de garde visé dans la Loi sur les services de garde à l'enfance (chapitre S-4.1), d'une famille d'accueil, d'une colonie de vacances ou autre installation similaire ainsi que d'une installation maintenue par une institution religieuse pour y recevoir ses membres ou adhérents;

3. Le ministre exerce les pouvoirs que la présente loi lui confère de façon:

a) à améliorer l'état de santé de la population, l'état du milieu social dans lequel elle vit et les conditions sociales des individus, des familles et des groupes;

. . .

c) à encourager la population et les groupes qui s'y forment à participer à l'instauration, à l'administration et au développement des établissements de façon à assurer leur dynamisme et leur renouvellement;

9. Tout établissement est public ou privé.

10. Est un établissement public:

a) tout établissement constitué en vertu de la présente loi ou résultant d'une fusion ou d'une conversion faite en vertu de la présente loi;

b) tout centre hospitalier ou centre de services sociaux qui est maintenu par une corporation sans but lucratif;

c) tout établissement qui utilise pour ses fins des actifs immobiliers qui sont la propriété d'une corporation sans but lucratif autre qu'une corporation constituée en vertu de la présente loi.

11. Est aussi établissement public, sous réserve de l'article 12, tout centre d'accueil qui est maintenu par une corporation sans but lucratif autre qu'une corporation visée à l'article 10.

12. However, a reception centre maintained by a non-profit corporation other than a corporation resulting from an amalgamation or conversion made under this Act is a private establishment:

(*a*) if it is arranged to receive not more than 20 persons at one time; or

(*b*) if it was already constituted on 1 January 1974 and if it operates without recourse to sums of money derived from the consolidated revenue fund or if such sums do not cover more than 80% of the net amounts it would receive for its current operating expenses, if it were a public establishment;

V — Analysis

A. *Rules for interpreting tax legislation*

In this Court the appellant argued that a provision creating a tax exemption should be interpreted by looking at the spirit and purpose of the legislation. In this connection it is worth looking briefly at the development of the rules for interpreting tax legislation in Canada and formulating certain principles. First, there is the traditional rule that tax legislation must be strictly construed: this applied both to provisions imposing a tax obligation and to those creating tax exemptions. The rule was based on the fact that, like penal legislation, tax legislation imposes a burden on individuals and accordingly no one should be made subject to it unless the wording of the Act so provides in a clear and precise manner. The effect of such an interpretation was to favour the taxpayer in the case of provisions imposing a tax obligation, and the courts placed on the tax department the burden of showing that the taxpayer fell clearly within the letter of the law. Conversely, a taxpayer claiming to benefit from an exemption had "to establish that the competent legislative authority, in clear and unequivocal language, [had] unquestionably granted him the exemption claimed" (Fauteux C.J. in *Ville de Montréal v. ILGWU Center Inc.*, [1974] S.C.R. 59, at p. 65). Any doubt was thus to be resolved in favour of the tax department. In view of this situation, it followed from the strict construction rule that in cases of doubt a presumption existed in the

12. Toutefois, un centre d'accueil qui est maintenu par une corporation sans but lucratif autre qu'une corporation résultant d'une fusion ou d'une conversion faite en vertu de la présente loi est un établissement privé:

a) s'il est aménagé pour recevoir à la fois au plus 20 personnes; ou

b) s'il était déjà constitué le 1er janvier 1974 et s'il fonctionne sans avoir recours à des sommes d'argent provenant du fonds consolidé du revenu ou si ces sommes ne couvrent pas plus de 80% des montants nets qu'il recevrait s'il était un établissement public au titre de ses dépenses courantes de fonctionnement;

V — Analyse

A. *Les règles d'interprétation des lois fiscales*

Devant notre Cour, l'appelante soutient qu'une disposition portant exemption de taxe devrait s'interpréter en recherchant l'esprit et la finalité du texte. Il y a lieu d'examiner brièvement à ce sujet l'évolution des règles d'interprétation des lois fiscales au Canada et de cristalliser certains principes. On se doit d'abord de souligner la règle traditionnelle selon laquelle les lois fiscales devaient recevoir une interprétation stricte; à cet égard, tant les dispositions qui imposaient une charge fiscale que celles qui portaient exemption de taxe étaient visées. Cette règle prenait son fondement dans le fait que les lois fiscales, comme les lois pénales, imposent un fardeau aux citoyens et qu'à ce titre, nul ne devait être soumis à leur application à moins que le texte de la loi ne le prévoie de façon claire et précise. Une telle interprétation avait pour effet de favoriser le contribuable dans les cas de dispositions imposant une charge fiscale, les tribunaux faisant porter au fisc le fardeau d'établir que le contribuable tombait nettement sous le coup de la lettre de la loi. À l'inverse, le contribuable qui prétendait bénéficier d'une exemption se devait «d'établir que, par un texte clair et non équivoque, l'autorité législative compétente lui [avait] indubitablement accordé l'exemption réclamée» (le juge en chef Fauteux dans *Ville de Montréal c. ILGWU Center Inc.*, [1974] R.C.S. 59, à la p. 65). Tout doute se résolvait donc en faveur du fisc. À la lumière de cet état de choses, on a dégagé de la règle d'interprétation stricte qu'en cas de doute, une présomption existait en faveur du contribuable

taxpayer's favour in taxing situations but against the taxpayer in those involving exemptions.

It should at once be noted that there is a risk of confusion between the rule that a taxing provision is to be strictly construed and the burden of proof resting upon the parties in an action between the government and a taxpayer. According to the general rule which provides that the burden of proof lies with the plaintiff, in any proceeding it is for the party claiming the benefit of a legislative provision to show that he is entitled to rely on it. The burden of proof thus rests with the tax department in the case of a provision imposing a tax obligation and with the taxpayer in the case of a provision creating a tax exemption. It will be noted that the presumptions mentioned earlier tend in more or less the same direction. This explains why these concepts have been at times superimposed to the point of being confused with each other. With respect, they are nevertheless two very different concepts. In any event, the rule of strict construction relates only to the clarity of the wording of the tax legislation: regardless of who bears the burden of proof, that person will have to persuade the court that the taxpayer is clearly covered by the wording of the legislative provision which it is sought to apply.

In Canada it was *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, which opened the first significant breach in the rule that tax legislation must be strictly construed. This Court there held, *per* Estey J., at p. 578, that the rule of strict construction had to be bypassed in favour of interpretation according to ordinary rules so as to give effect to the spirit of the Act and the aim of Parliament:

> . . . the role of the tax statute in the community changed, as we have seen, and the application of strict construction to it receded. Courts today apply to this statute the plain meaning rule, but in a substantive sense so that if a taxpayer is within the spirit of the charge, he may be held liable.

This turning point in the development of the rules for interpreting tax legislation in Canada was prompted by the realization that the purpose of tax

dans les cas d'imposition mais au détriment de ce dernier en matière d'exemption.

Il y a tout de suite lieu de souligner la confusion qui risque de s'opérer entre la règle d'interprétation stricte d'une disposition de nature fiscale et le fardeau de preuve qui incombe aux parties dans une demande opposant l'État et un contribuable. En effet, selon la règle générale qui prévoit que le fardeau de preuve repose sur le demandeur, en toute matière il appartient à celui qui invoque le bénéfice de l'application d'une disposition législative de démontrer qu'il peut s'en prévaloir. Le fardeau de preuve repose donc sur le fisc lorsqu'on est en présence d'une disposition qui impose une charge fiscale et sur le contribuable dans le cas d'une disposition qui porte exemption de taxe. On notera que les présomptions mentionnées plus haut vont sensiblement dans le même sens. Ceci explique qu'on ait pu superposer ces notions jusqu'à les confondre. Avec égards, il s'agit là néanmoins de deux concepts fort différents. En tout état de cause, la règle de l'interprétation stricte s'attache uniquement à la clarté de la formulation de la loi fiscale: peu importe à qui incombe le fardeau de preuve, celui-là aura à convaincre le tribunal que le contribuable est clairement visé par le libellé de la disposition législative dont l'application est réclamée.

Au Canada, c'est l'arrêt *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, qui a ouvert la première brèche significative dans la règle de l'interprétation stricte des lois fiscales. Notre Cour y a établi, sous la plume du juge Estey, à la p. 578, que l'on devait s'écarter de la règle de l'interprétation stricte au profit d'une interprétation selon les règles ordinaires, de manière à donner effet à l'esprit de la loi et au but du législateur:

> . . . le rôle des lois fiscales a changé dans la société et l'application de l'interprétation stricte a diminué. Aujourd'hui, les tribunaux appliquent à cette loi la règle du sens ordinaire, mais en tenant compte du fond, de sorte que si l'activité du contribuable relève de l'esprit de la disposition fiscale, il sera assujetti à l'impôt.

Ce point tournant dans l'évolution des principes d'interprétation des lois fiscales au Canada a été motivé par le constat selon lequel le but des lois

legislation is no longer simply to raise funds with which to cover government expenditure. It was recognized that such legislation is also used for social and economic purposes. In *The Queen v. Golden*, [1986] 1 S.C.R. 209, at pp. 214-15, Estey J. for the majority explained *Stubart* as follows:

> In *Stubart* . . . the Court recognized that in the construction of taxation statutes the law is not confined to a literal and virtually meaningless interpretation of the Act where the words will support on a broader construction a conclusion which is workable and in harmony with the evident purposes of the Act in question. Strict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statutes in an era such as the present, where taxation serves many purposes in addition to the old and traditional object of raising the cost of government from a somewhat unenthusiastic public.

Such a rule also enabled the Court to direct its attention to the actual nature of the taxpayer's operations, and so to give substance precedence over form, when so doing in appropriate cases would make it possible to achieve the purposes of the legislation in question. (See *Johns-Manville Canada Inc. v. The Queen*, [1985] 2 S.C.R. 46, and *The Queen v. Imperial General Properties Ltd.*, [1985] 2 S.C.R. 288.) It is important, however, not to conclude too hastily that this latter rule (giving substance precedence over form) should be applied mechanically, as it only has real meaning if it is consistent with the analysis of legislative intent. As Dickson C.J. noted in *Bronfman Trust v. The Queen*, [1987] 1 S.C.R. 32, at pp. 52-53:

> I acknowledge, however, that just as there has been a recent trend away from strict construction of taxation statutes . . . so too has the recent trend in tax cases been towards attempting to ascertain the true commercial and practical nature of the taxpayer's transactions. There has been, in this country and elsewhere, a movement away from tests based on the form of transactions and towards tests based on what Lord Pearce has referred to as a "common sense appreciation of all the guiding features" of the events in question . . .

fiscales n'est plus confiné à la seule levée de fonds pour faire face aux dépenses gouvernementales. Il est reconnu que ces lois servent aussi à des fins d'intervention sociale et économique. Dans *La Reine c. Golden*, [1986] 1 R.C.S. 209, aux pp. 214 et 215, le juge Estey pour la majorité explique l'arrêt *Stubart* en ces termes:

> Dans l'arrêt *Stubart* [. . .] la Cour a reconnu que, dans l'interprétation des lois fiscales, la règle applicable ne se limite pas à une interprétation de la loi littérale et presque dépourvue de sens lorsque, selon une interprétation plus large, les mots permettent d'arriver à une conclusion réalisable et compatible avec les objectifs évidents de la loi en cause. L'interprétation stricte, au sens historique du terme, n'a plus sa place dans les règles d'interprétation applicables aux lois fiscales à une époque comme la nôtre où la fiscalité sert beaucoup d'autres objectifs que l'objectif ancien et traditionnel qui était de prélever des fonds pour les dépenses du gouvernement chez un public quelque peu réticent.

L'élaboration d'un tel principe a également permis à la Cour de s'attacher à la réalité des opérations du contribuable et, en ce sens, de privilégier le fond sur la forme, lorsqu'en des cas appropriés agir de la sorte permettrait d'atteindre les buts de la disposition législative en cause. (Voir les arrêts *Johns-Manville Canada Inc. c. La Reine*, [1985] 2 R.C.S. 46, et *La Reine c. Imperial General Properties Ltd.*, [1985] 2 R.C.S. 288.) L'on doit néanmoins se garder de conclure trop hâtivement à l'application mécanique de cette dernière règle (primauté du fond sur la forme), celle-ci ne prenant son véritable sens que si elle s'inscrit dans la recherche de l'intention du législateur. Comme le souligne le juge en chef Dickson dans l'arrêt *Bronfman Trust c. La Reine*, [1987] 1 R.C.S. 32, aux pp. 52 et 53:

> Je reconnais toutefois que, tout comme il y a eu tendance dernièrement à s'éloigner d'une interprétation stricte des lois fiscales [. . .], de même la jurisprudence récente en matière fiscale a tendance à essayer de déterminer la véritable nature commerciale et pratique des opérations du contribuable. En effet, au Canada et ailleurs, les critères fondés sur la forme des opérations sont laissés de côté en faveur de critères fondés sur ce que lord Pearce a appelé une [TRADUCTION] «appréciation saine de toutes les caractéristiques directrices» des événements en question . . .

This is, I believe, a laudable trend provided it is consistent with the text and purposes of the taxation statute. Assessment of taxpayers' transactions with an eye to commercial and economic realities, rather than juristic classification of form, may help to avoid the inequity of tax liability being dependent upon the taxpayer's sophistication at manipulating a sequence of events to achieve a patina of compliance with the apparent prerequisites for a tax deduction.

This does not mean, however, that a deduction such as the interest deduction in s. 20(1)(*c*)(i), which by its very text is made available to the taxpayer in limited circumstances, is suddenly to lose all its strictures. [Emphasis added.]

Il s'agit là, je crois, d'une tendance louable, pourvu qu'elle soit compatible avec le texte et l'objet de la loi fiscale. Si, en appréciant les opérations des contribuables, on a présent à l'esprit les réalités commerciales et économiques plutôt que quelque critère juridique formel, cela aidera peut-être à éviter que l'assujettissement à l'impôt dépende, ce qui serait injuste, de l'habileté avec laquelle le contribuable peut se servir d'une série d'événements pour créer une illusion de conformité avec les conditions apparentes d'admissibilité à une déduction d'impôt.

Cela ne signifie toutefois pas qu'une déduction telle que la déduction au titre d'intérêts prévue par le sous-al. 20(1)*c*)(i), laquelle, de par le texte même de cette disposition, ne peut être réclamée par un contribuable que dans des circonstances bien précises, ne doive tout à coup plus faire l'objet d'aucune restriction. [Je souligne.]

In light of this passage there is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction. At page 87 of his text *Construction of Statutes* (2nd ed. 1983), Driedger fittingly summarizes the basic principles: ". . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision. The following passage from Vivien Morgan's article "Stubart: What the Courts Did Next" (1987), 35 *Can. Tax J.* 155, at pp. 169-70, adequately summarizes my conclusion:

Il ne fait plus de doute, à la lumière de ce passage, que l'interprétation des lois fiscales devrait être soumise aux règles ordinaires d'interprétation. Driedger, à la p. 87 de son volume *Construction of Statutes* (2e éd. 1983), en résume adéquatement les principes fondamentaux: [TRADUCTION] «. . . il faut interpréter les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur». Primauté devrait donc être accordée à la recherche de la finalité de la loi, que ce soit dans son ensemble ou à l'égard d'une disposition précise de celle-ci. Ce passage de Mme Vivien Morgan, dans son article intitulé «Stubart: What the Courts Did Next» (1987), 35 *Can. Tax J.* 155, aux pp. 169 et 170, résume adéquatement mon propos:

There has been one distinct change [after *Stubart*], however, in the resolution of ambiguities. In the past, resort was often made to the maxims that an ambiguity in a taxing provision is resolved in the taxpayer's favour and that an ambiguity in an exempting provision is resolved in the Crown's favour. Now an ambiguity is usually resolved openly by reference to legislative intent. [Emphasis added.]

[TRADUCTION] Toutefois, il y a eu un net changement [après *Stubart*] dans la résolution d'ambiguïtés. Dans le passé, on recourait souvent aux maximes selon lesquelles toute ambiguïté dans une disposition fiscale doit être résolue en faveur du contribuable et toute ambiguïté dans une disposition prévoyant une exemption doit être résolue en faveur de Sa Majesté. De nos jours, une ambiguïté est habituellement résolue ouvertement en tenant compte de l'intention du législateur. [Je souligne.]

The teleological approach makes it clear that in tax matters it is no longer possible to reduce the rules of interpretation to presumptions in favour of or

L'approche téléologique fait clairement ressortir qu'il n'est plus possible, en matière fiscale, de réduire les principes d'interprétation à des pré-

against the taxpayer or to well-defined categories known to require a liberal, strict or literal interpretation. I refer to the passage from Dickson C.J., *supra*, when he says that the effort to determine the purpose of the legislation does not mean that a specific provision loses all its strictures. In other words, it is the teleological interpretation that will be the means of identifying the purpose underlying a specific legislative provision and the Act as a whole; and it is the purpose in question which will dictate in each case whether a strict or a liberal interpretation is appropriate or whether it is the tax department or the taxpayer which will be favoured.

In light of the foregoing, I should like to stress that it is no longer possible to apply automatically the rule that any tax exemption should be strictly construed. It is not incorrect to say that when the legislature makes a general rule and lists certain exceptions, the latter must be regarded as exhaustive and so strictly construed. That does not mean, however, that this rule should be transposed to tax matters so as to make an absolute parallel between the concepts of exemption and exception. With respect, adhering to the principle that taxation is clearly the rule and exemption the exception no longer corresponds to the reality of present-day tax law. Such a way of looking at things was undoubtedly tenable at a time when the purpose of tax legislation was limited to raising funds to cover government expenses. In our time it has been recognized that such legislation serves other purposes and functions as a tool of economic and social policy. By submitting tax legislation to a teleological interpretation it can be seen that there is nothing to prevent a general policy of raising funds from being subject to a secondary policy of exempting social works. Both are legitimate purposes which equally embody the legislative intent and it is thus hard to see why one should take precedence over the other.

somptions en faveur ou au détriment du contribuable ou encore à des catégories bien circonscrites dont on saurait si elles requièrent une interprétation libérale, stricte ou littérale. Je renvoie au passage du juge en chef Dickson, précité, lorsqu'il souligne que la recherche de la finalité de la loi ne signifie pas pour autant qu'une disposition précise ne doive plus faire l'objet de restrictions. En somme, c'est l'interprétation téléologique qui permettra d'identifier l'objectif qui sous-tend une disposition législative spécifique et le texte de loi dans son ensemble. Et c'est l'objectif en question qui dictera, dans chaque cas, si une interprétation stricte ou libérale est appropriée ou encore si c'est le fisc ou le contribuable qui sera favorisé.

À la lumière de ce qui précède, je me permets de souligner qu'on ne peut plus conclure à l'application automatique de la règle selon laquelle toute exemption de taxe devrait recevoir une interprétation stricte. Il n'est pas inexact de dire que lorsque le législateur prévoit une règle générale et énumère certaines exceptions, ces dernières doivent être considérées comme exhaustives et dès lors interprétées de façon stricte. Cela ne nous autorise pas pour autant à transposer ce principe en matière fiscale de manière à établir un parallèle indéfectible entre les notions d'exemption et d'exception. Avec égards, adhérer à l'acception voulant que la taxe soit indubitablement la règle et l'exemption, l'exception, ne répond plus aux réalités du droit fiscal actuel. Une telle façon d'envisager les choses était certes soutenable à une époque où l'objectif de la loi fiscale était limité à la levée de fonds pour faire face aux dépenses du gouvernement. Or il a été reconnu que, de nos jours, la loi sert d'autres objectifs et se présente comme instrument d'intervention économique et sociale. En soumettant la loi fiscale à une interprétation téléologique, on constate que rien n'empêche qu'une politique générale de levée de fonds soit assujettie à une politique secondaire d'exemption des œuvres sociales. Il s'agit là de deux buts légitimes qui expriment également l'intention du législateur et, à ce titre, on voit difficilement pourquoi l'un devrait primer l'autre.

One final aspect requires consideration. In *Johns-Manville Canada*, *supra*, this Court itself referred to a residual presumption in favour of the taxpayer, and were it not for certain qualifications that must be added, it would be difficult to justify maintaining this presumption in light of what was discussed earlier. Estey J. said the following at p. 72:

> . . . where the taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer. This residual principle must be the more readily applicable in this appeal where otherwise annually recurring expenditures, completely connected to the daily business operation of the taxpayer, afford the taxpayer no credit against tax either by way of capital cost or depletion allowance with reference to a capital expenditure, or an expense deduction against revenue. [Emphasis added.]

Earlier, at p. 67, he said the following:

> On the other hand, if the interpretation of a taxation statute is unclear, and one reasonable interpretation leads to a deduction to the credit of a taxpayer and the other leaves the taxpayer with no relief from clearly *bona fide* expenditures in the course of his business activities, the general rules of interpretation of taxing statutes would direct the tribunal to the former interpretation.

Two comments should be made to give Estey J.'s observations their full meaning: first, recourse to the presumption in the taxpayer's favour is indicated when a court is compelled to choose between two valid interpretations, and second, this presumption is clearly residual and should play an exceptional part in the interpretation of tax legislation. In his text *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 412, Professor Pierre-André Côté summarizes the point very well:

> If the taxpayer receives the benefit of the doubt, such a "doubt" must nevertheless be "reasonable". A taxation statute should be "reasonably clear". This criterion is not satisfied if the usual rules of interpretation have not already been applied in an attempt to clarify the problem. The meaning of the enactment must first be ascer-

Il me reste à traiter d'un dernier aspect. Notre Cour a elle-même fait référence à une présomption résiduelle en faveur du contribuable dans l'affaire *Johns-Manville Canada*, précitée; et si ce n'était de certaines précisions à apporter, le maintien de cette présomption pourrait difficilement se justifier dans le cadre de la discussion tenue plus haut. Le juge Estey s'exprime ainsi à la p. 72:

> . . . si la loi fiscale n'est pas explicite, l'incertitude raisonnable ou l'ambiguïté des faits découlant du manque de clarté de la loi doit jouer en faveur du contribuable. Ce principe résiduel doit d'autant s'appliquer au présent pourvoi qu'autrement une dépense annuelle entièrement liée à l'exploitation quotidienne de l'entreprise de la contribuable ne lui procurerait aucun dégrèvement d'impôt sous forme de déduction pour amortissement ou pour épuisement s'il s'agit d'une dépense de capital, ou de déduction applicable au revenu s'il s'agit d'une dépense d'exploitation. [Je souligne.]

Auparavant, à la p. 67, il tenait les propos suivants:

> D'autre part, si l'interprétation d'une loi fiscale n'est pas claire et qu'une interprétation raisonnable entraîne une déduction au profit du contribuable alors qu'une autre interprétation laisse le contribuable sans allégement pour les dépenses réelles faites dans le cours de ses opérations commerciales, selon les règles d'interprétation des lois fiscales, le tribunal devrait choisir la première interprétation.

Deux observations doivent être faites pour donner tout leur sens aux propos du juge Estey: d'une part, le recours à la présomption en faveur du contribuable est indiqué lorsqu'un tribunal est contraint de choisir entre deux interprétations valables et, d'autre part, cette présomption est clairement résiduelle et devrait jouer un rôle exceptionnel dans l'interprétation des lois fiscales. Dans son ouvrage *Interprétation des lois* (2e éd. 1990), à la p. 470, le professeur Pierre-André Côté résume la question d'une manière fort juste:

> Le doute dont le contribuable peut bénéficier doit être «raisonnable»: la loi fiscale doit être «raisonnablement claire». Ne serait pas raisonnable un doute que l'interprète n'a pas essayé de dissiper grâce aux règles ordinaires d'interprétation: le premier devoir de l'interprète est de rechercher le sens et ce n'est qu'à défaut de pou-

tained, and only where this proves impossible can that which is more favourable to the taxpayer be chosen.

The rules formulated in the preceding pages, some of which were relied on recently in *Symes v. Canada*, [1993] 4 S.C.R. 695, may be summarized as follows:

- The interpretation of tax legislation should follow the ordinary rules of interpretation;

- A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach;

- The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;

- Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute;

- Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

B. *Characterization of La Champenoise as a reception centre used for the purposes provided in the Act*

Two reasons were given by Bisson C.J.Q. for allowing the respondents' appeal: first, the legal and factual existence of La Champenoise does not indicate that all its facilities can meet the definition of a reception centre; second, it is a mistake to conclude, as the courts below did, that the availability of the services offered means that the immovable is being used for the purposes provided by the *A.H.S.S.S.*, as required by s. 204(14) *A.M.T.*

The first reason is based principally on analysis of s. 1(*k*) *A.H.S.S.S.* I reproduce it again here for the sake of convenience:

voir arriver à un résultat raisonnablement certain que l'on peut choisir de retenir celui, de plusieurs sens possibles, qui favorise le contribuable.

Les principes dégagés dans les pages précédentes, dont certains, d'ailleurs, ont été récemment invoqués dans l'affaire *Symes c. Canada*, [1993] 4 R.C.S. 695, peuvent se résumer ainsi:

- L'interprétation des lois fiscales devrait obéir aux règles ordinaires d'interprétation;

- Qu'une disposition législative reçoive une interprétation stricte ou libérale sera déterminé par le but qui la sous-tend, qu'on aura identifié à la lumière du contexte de la loi, de l'objet de celle-ci et de l'intention du législateur; c'est l'approche téléologique;

- Que l'approche téléologique favorise le contribuable ou le fisc dépendra uniquement de la disposition législative en cause et non de l'existence de présomptions préétablies;

- Primauté devrait être accordée au fond sur la forme dans la mesure où cela est compatible avec le texte et l'objet de la loi;

- Seul un doute raisonnable et non dissipé par les règles ordinaires d'interprétation sera résolu par le recours à la présomption résiduelle en faveur du contribuable.

B. *La qualification de La Champenoise comme centre d'accueil servant aux fins prévues par la loi*

Deux motifs sont invoqués par le juge en chef Bisson de la Cour d'appel pour accueillir l'appel des intimées: d'une part, l'existence juridique et factuelle de La Champenoise ne fait pas valoir qu'elle puisse répondre à la définition de centre d'accueil pour l'ensemble de ses installations; d'autre part, il est erroné de s'attacher à l'accessibilité des services offerts, comme l'ont fait les instances dont appel, pour conclure que l'immeuble sert aux fins prévues par la *L.S.S.S.S.*, tel que l'exige le par. 204(14) *L.F.M.*

Quant au premier motif, il repose principalement sur l'analyse de l'al. 1*k*) *L.S.S.S.S.* Je le reproduis ici pour des motifs de commodité:

(*k*) "reception centre": facilities where in-patient, out-patient or home-care services are offered for the lodging, maintenance, keeping under observation, treatment or social rehabilitation, as the case may be, of persons whose condition, by reason of their age or their physical, personality, psycho-social or family deficiencies, is such that they must be treated, kept in protected residence or, if need be, for close treatment, or treated at home, including nurseries, but excepting day care establishments contemplated in the Act respecting child day care (chapter S-4.1), foster families, vacation camps and other similar facilities and facilities maintained by a religious institution to receive its members or followers; [Emphasis added.]

k) «centre d'accueil» : une installation où l'on offre des services internes, externes ou à domicile pour, le cas échéant, loger, entretenir, garder sous observation, traiter ou permettre la réintégration sociale des personnes dont l'état, en raison de leur âge ou de leurs déficiences physiques, caractérielles, psychosociales ou familiales, est tel qu'elles doivent être soignées, gardées en résidence protégée ou, s'il y a lieu, en cure fermée ou traitées à domicile, y compris une pouponnière, mais à l'exception d'un service de garde visé dans la Loi sur les services de garde à l'enfance (chapitre S-4.1), d'une famille d'accueil, d'une colonie de vacances ou autre installation similaire ainsi que d'une installation maintenue par une institution religieuse pour y recevoir ses membres ou adhérents; [Je souligne.]

Two parts of this definition may be considered: to be treated as a reception centre an establishment must first offer certain services; it must then place these services at the disposal of persons whose condition requires them. This is the part relating to need. It will be seen that for both parts the paragraph is worded disjunctively. For the "services" part, the words "or" and "as the case may be" clearly indicate that lodging is a service sufficient in itself to meet the requirements of the definition. There is no need to offer the full range of services mentioned in s. 1(*k*) *A.H.S.S.S.* in order to qualify as a reception centre; nonetheless, the evidence was that the La Champenoise population as a whole benefits from a large number of them. The paragraph is worded similarly for the "need" part, in that age is sufficient as such to justify a need to be treated or kept in a protected residence, regardless of any physical, personality, psycho-social or family deficiency. The notion of care in this sense cannot be limited to a purely therapeutic aspect. As to the concept of a protected residence, for which no statutory definition is given, it should not be given a narrower meaning than that of a residence providing a secure location adapted to the special physical and mental needs of the people for whom it was designed and whom it serves.

Deux volets peuvent être dégagés de cette définition: pour être considéré comme un centre d'accueil, un établissement doit d'abord offrir certains services; il doit ensuite mettre ces services à la disposition de personnes dont l'état le requiert. C'est l'élément relatif au besoin. Or pour l'un et l'autre volet, on constate que l'alinéa est rédigé de façon disjonctive. En ce qui concerne le volet «services», les mots «ou» et «le cas échéant» laissent clairement entendre que le logement est un service suffisant en lui-même pour répondre aux exigences de la définition. Point n'est besoin d'offrir la gamme entière des services que l'on retrouve à l'al. 1*k*) *L.S.S.S.S.* pour se qualifier comme centre d'accueil; la preuve démontre néanmoins que l'ensemble de la population de La Champenoise bénéficie d'une large part d'entre eux. Quant au volet «besoin», la rédaction de l'alinéa est au même effet, savoir que l'âge est suffisant en tant que tel pour justifier un besoin d'être soigné ou gardé en résidence protégée et ce, indépendamment de toute déficience physique, caractérielle, psychosociale ou familiale. La notion de soins, en ce sens, ne saurait être restreinte à une dimension purement thérapeutique. Quant au concept de résidence protégée, pour lequel on ne trouve pas de définition statutaire, il ne devrait pas recevoir d'acception plus étroite que celle de résidence offrant un cadre sécuritaire adapté aux besoins physiques et moraux particuliers de la population pour laquelle elle a été conçue et qu'elle dessert.

The fact that La Champenoise requires its residents to be physically and psychologically

Que La Champenoise requière que ses bénéficiaires soient, à l'admission, autonomes physique-

autonomous on admission is an entirely different matter, and that leads me to discuss the second reason. I note that Bisson C.J.Q. mentioned that the availability of services should not be a basis for assessing the need of residents and, indirectly, determining whether the La Champenoise property was being used for the purposes provided in the *A.H.S.S.S.* I share this view. With respect, however, I consider that the need of an elderly person also cannot be determined by his or her autonomy. It can certainly be concluded from the definition of a reception centre that the autonomy of those referred to in s. 1(*k*) may be affected in varying degrees. That does not mean we can conclude that an autonomous person is not in need of care and protection, *a fortiori* if as in the case at bar the autonomy is only determined at the stage of admission and will inevitably diminish thereafter. Nowhere is it stated that the individual's need must be immediate. There is no bar to its being foreseeable.

ment et psychologiquement est une tout autre question. Et c'est ce qui m'amène à traiter du second motif. Je rappelle que le juge en chef Bisson a souligné qu'on ne pouvait s'attacher à l'accessibilité des services pour évaluer le besoin des bénéficiaires et, indirectement, déterminer si l'immeuble de La Champenoise servait aux fins prévues par la *L.S.S.S.S.* Je partage cette opinion. Avec égards, j'estime néanmoins qu'on ne peut pas non plus décider du besoin d'une personne âgée en se fondant sur son autonomie. On peut certes déduire de la définition de centre d'accueil que l'autonomie des personnes auxquelles on réfère à l'al. 1*k*) puisse être affectée à des degrés variables. Cela ne nous autorise pas pour autant à conclure qu'une personne autonome n'ait pas besoin de soins et de protection, à fortiori si l'autonomie, comme en l'espèce, est appréciée au seul stade de l'admission et qu'elle est inéluctablement appelée à s'amenuiser par la suite. Nulle part il n'est dit que le besoin de l'individu doit être immédiat. Rien ne s'oppose à ce qu'il soit prévisible.

With respect, the autonomy of elderly persons at the time of their admission cannot be the decisive test in determining the concept of need as provided for in s. 1(*k*) *A.H.S.S.S.* In the same way, it also cannot be used to determine whether La Champenoise's immovable is being used for the purposes provided by the Act, as prescribed in s. 204(14) *A.M.T.* The outcome of the latter analysis will depend entirely on the finding, whether satisfactory or otherwise, that in fact the institution is designed and adapted for accommodating the elderly with a real need, though that need may be variable in degree or immediacy.

Avec respect, l'autonomie des personnes âgées au moment de leur admission ne saurait être le critère déterminant pour évaluer la notion de besoin telle que prévue à l'al. 1*k*) *L.S.S.S.S.* Par ricochet, on ne peut non plus s'en prévaloir pour décider si l'immeuble de La Champenoise sert aux fins prévues par la loi, tel que le prescrit le par. 204(14) *L.F.M.* L'issue de ce dernier examen repose entièrement sur la constatation, satisfaisante ou non, que dans les faits, cette institution est conçue et adaptée pour recevoir des personnes âgées dont le besoin est réel même s'il peut être variable, en degré ou en imminence.

Section 12(*b*) *A.H.S.S.S.*, reproduced earlier and applicable to the situation of La Champenoise, might well have added to the previous test the requirement that the establishment be legally made a reception centre on January 1, 1974. The only date referred to by Mr. Barbe of the BREF in this matter is that of the incorporation of La Champenoise as a non-profit corporation. It is implicit from his reasons that 1964 is the year to be considered in fixing a starting-point for the activities of

L'alinéa 12*b*) *L.S.S.S.S.*, reproduit plus haut et qui s'applique à la situation de La Champenoise, aurait fort bien pu ajouter au précédent critère en exigeant que l'établissement soit juridiquement constitué en centre d'accueil au 1er janvier 1974. Pour sa part, la seule date à laquelle Me Barbe, du BREF, fait référence en la matière est celle de la constitution de La Champenoise en tant que corporation sans but lucratif. Il ressort implicitement de ses motifs que 1964 est l'année à considérer lors-

La Champenoise as a reception centre. He concludes, at p. 137 of the BREF's decision:

[TRANSLATION] It appears from the evidence that these were "facilities where in-patient . . . services are offered for the lodging, maintenance, keeping under observation, treatment . . . of persons whose condition, by reason of their age . . . is such that they must be treated, kept in protected residence . . .". The establishment is accordingly one that meets the legislative definition of a "reception centre".

These reasons are in accord with the findings of fact made by Judge Larochelle of the Provincial Court in a judgment allowing an application for an earlier exemption, included in the case on appeal with supporting testimony. It states:

[TRANSLATION] Over this four-year period, from 1972 to 1975 inclusive, [La Champenoise] as a non-profit corporation always pursued its stated purposes and objectives, namely lodging and sheltering at a low cost elderly persons who are in need, while at the same time providing them with medical care and giving them every assistance and moral support made necessary by their state and condition, and did so consistently.

(*Ville de Québec v. Corp. Notre-Dame de Bon-Secours*, Prov. Ct. Québec, No. 200-02-008522-783, November 27, 1980, at p. 10.)

The respondents argued that the appellant could not have been established as a reception centre on January 1, 1974 since at that time it was still covered by the *Public Charities Act*, R.S.Q. 1964, c. 216. With respect, that does not call into question the implicit conclusion of the BREF, since there is nothing to prevent La Champenoise from having in fact been able to meet the requirements of both statutes. This conclusion is all the more compelling when we consider that historically the *A.H.S.S.S.* was adopted in order to update certain older legislation, including the *Public Charities Act*, while preserving the fundamental principles contained in that legislation. From this perspective, it necessarily follows that the test to be adopted in determining whether the property is being used for the purposes provided in the Act must be limited to an assessment of the reception centre *de facto*.

qu'il s'agit de donner un point de départ aux activités de La Champenoise en tant que centre d'accueil. Il conclut, à la p. 137 de la décision du BREF:

D'après la preuve, il appert qu'il s'agit d'«une installation où l'on offre des services internes (. . .) pour (. . .) loger, entretenir, garder sous observation, traiter (. . .) des personnes dont l'état, en raison de leur âge (. . .) est tel qu'elles doivent être soignées, gardées en résidence protégée (. . .)». Il s'agit donc d'un établissement qui rencontre la définition législative de «centre d'accueil».

Ces motifs rejoignent les constatations de fait du juge Larochelle de la Cour provinciale dans un jugement accueillant une demande d'exemption antérieure et versé dans le présent dossier avec les témoignages à l'appui. On y lit:

Au cours de cette période de quatre ans, soit de 1972 à 1975 inclusivement, [La Champenoise], comme corporation sans but lucratif, a toujours poursuivi ses fins et objets constitutifs savoir: loger et héberger, à des prix modiques, des personnes âgées et dans le besoin, tout en leur fournissant les soins médicaux et leur procurant toute l'assistance et le support moral requis par leur état et leur condition, et ce sans aucun changement.

(*Ville de Québec c. Corp. Notre-Dame de Bon-Secours*, C.P. Québec, nº 200-02-008522-783, 27 novembre 1980, à la p. 10.)

Les intimées soulèvent que l'appelante ne pouvait être constituée en centre d'accueil au 1er janvier 1974 puisqu'à cette date, elle était toujours sous l'emprise de la *Loi de l'assistance publique*, S.R.Q. 1964, ch. 216. Avec égards, il ne s'agit pas là d'une remise en cause de la conclusion implicite du BREF puisque rien n'empêche que La Champenoise ait pu, dans les faits, répondre aux exigences des deux lois. À plus forte raison l'idée s'impose-t-elle lorsqu'on sait qu'historiquement, la *L.S.S.S.S.* a été adoptée pour actualiser certaines lois plus anciennes, dont la *Loi de l'assistance publique*, tout en conservant les principes fondamentaux qui les sous-tendaient. Dans cette perspective, force nous est de constater que le critère à retenir pour déterminer si l'immeuble sert aux fins prévues par la loi se limite à une appréciation du centre d'accueil *de facto*.

Here we have these positive findings by the BREF that the services provided by La Champenoise, taken together with the needs of its residents, lead to the conclusion that it must be classified in its entirety as a reception centre for the purposes of the Act. It was objected that the BREF had not applied s. 2 *A.M.T.* and divided the unit of assessment. With respect, it is clear from the reasons of Mr. Barbe that that section was not overlooked. This is especially apparent in his decision when he notes, referring to the assessor's work, [TRANSLATION] "[that the latter] established the percentage of the exemption but not the principle of an exempt part and a part subject to tax" (p. 134). Though aware of the existence of s. 2 *A.M.T.*, the BREF nevertheless considered that La Champenoise was operating facilities which as a whole met the two parts of the definition of a reception centre. Moreover, it was in the best position to conclude, following a visit to the premises, that the undertaking was indivisible, and this conclusion was concurred in by Judge Aubé of the Provincial Court on appeal, as mentioned earlier. The primary area of expertise of this specialized tribunal is certainly not that of social services: I would note, however, that what was required here was to define a reception centre for tax purposes. That being so, there is no need to question its findings.

Or, ici nous avons ces constatations positives du BREF que les services offerts par La Champenoise, conjugués aux besoins de ses bénéficiaires, font en sorte que cette dernière doive être entièrement qualifiée de centre d'accueil aux yeux de la loi. On reproche au BREF de ne pas avoir appliqué l'art. 2 *L.F.M.* pour scinder l'unité d'évaluation. Avec respect, il ressort des motifs de Me Barbe que cet article n'a pas été ignoré. Et ceci se reflète particulièrement dans sa décision où il souligne, en référant au travail de l'évaluateur, «[que ce dernier] a établi le pourcentage de l'exemption mais non le principe d'une partie exempte et d'une partie imposée» (p. 134). Conscient de l'existence de l'art. 2 *L.F.M.*, le BREF a néanmoins estimé que La Champenoise exploitait des installations qui, dans leur globalité, répondaient aux deux volets de la définition de centre d'accueil. Nul autre que lui n'était, du reste, mieux placé pour conclure à l'indivisibilité de l'entreprise, au terme d'une visite qu'il a effectuée sur les lieux, conclusion qu'a partagée le juge Aubé de la Cour provinciale siégeant en appel et cité plus haut. L'expertise première de ce tribunal spécialisé n'est certes pas celle des services sociaux; je note néanmoins qu'il s'agissait ici de définir un centre d'accueil pour des fins fiscales. Ceci étant, il n'y a pas lieu de revenir sur ses conclusions.

In this Court the respondents the Communauté urbaine de Québec and the City of Québec cited the decision in *Services de santé et services sociaux — 7*, [1987] C.A.S. 579, in support of their arguments that La Champenoise could not be classified as a reception centre in its entirety. That decision was clearly made by a tribunal specializing in social services. With respect, the fact remains that that case cannot apply here. The Commission des affaires sociales ("the Commission") was required to interpret the concept of a reception centre in connection with the power of the Minister of Health and Social Services to relocate two elderly residents living in a home which had no permit within the meaning of s. 136 *A.H.S.S.S.* In addition to accommodation, the home provided food and care to the two residents, whose respective conditions required regular attention,

Devant notre Cour, les intimées Communauté urbaine de Québec et ville de Québec ont invoqué l'affaire *Services de santé et services sociaux — 7*, [1987] C.A.S. 579, à l'appui de leurs prétentions selon lesquelles La Champenoise ne pouvait, dans sa totalité, se qualifier comme centre d'accueil. Certes, cette décision émane d'un tribunal spécialisé en affaires sociales. Avec égards, il n'en demeure pas moins que cette affaire ne peut s'appliquer au cas d'espèce. Il s'agissait pour la Commission des affaires sociales (la «Commission») d'interpréter la notion de centre d'accueil dans le contexte du pouvoir de relocalisation du ministre de la Santé et des Services sociaux de deux résidents âgés habitant un foyer ne détenant pas de permis au sens de l'art. 136 *L.S.S.S.S.* Outre le logement, le foyer dispensait la nourriture et les soins aux deux résidents, dont l'état respectif

one having difficulty in moving about and the other being subject to periods of confusion. The Commission reversed the Minister's decision and found that the home in question was not a reception centre within the meaning of s. 1(*k*) *A.H.S.S.S.* In a passage which I shall reproduce at length for greater clarity, the Commission said the following, at p. 582:

[TRANSLATION] The activities described in this definition of a reception centre are in fact very broad and capable of being carried on in various locations where individuals are lodged. Offering in-patient services for the lodging and maintenance of individuals is thus a task which in our society is far from being a function exclusive to reception centres. Even in the case of persons having certain problems or deficiencies, such centres do not have a monopoly.

There are in fact many places providing lodging to elderly persons whose autonomy is more limited and who, though not needing constant care, simply must live in places where . . . certain maintenance services are provided for them. In such places they may find someone capable of providing a form of assistance and help if required, not to mention out-patient services which are provided to them in the same way as if they lived elsewhere.

Formerly, such persons found this type of lodging within an extended family unit. Now, this resource is less available and they must have access to different places.

In the Commission's opinion this is not the type of lodging contemplated by the relocation power conferred on the Minister by s. 182 [*A.H.S.S.S.*]. That power, which is special and exceptional, is an incidental measure for the purpose of penalizing a breach of the Act, namely the operation of an establishment without a permit (s. 136).

The establishment is truly a *facility* whose activities must be so arranged that relatively constant special care can be provided to the persons living there who require it. It is not a place the primary activity of which is to lodge and maintain persons who may occasionally need certain care and for whom it provides reassuring and beneficial surroundings.

The Minister's power of relocation should not be isolated but seen in its context. Otherwise it might be used to transfer one or more persons from locations where

nécessitait un suivi régulier, l'un ayant de la difficulté à se mouvoir et l'autre étant sujet à des accès de confusion. La Commission renversa la décision du Ministre et soutint que le foyer en question n'était pas un centre d'accueil au sens de l'al. 1*k*) *L.S.S.S.S.* Dans un passage que je reproduis au long pour une meilleure compréhension, la Commission s'exprime ainsi, à la p. 582:

Les activités décrites dans cette définition de centre d'accueil sont en réalité très vastes et susceptibles d'être exercées dans plusieurs endroits où sont hébergés des individus. Offrir des services internes pour loger et entretenir des personnes est ainsi une tâche qui est loin d'être, dans notre société, exclusive aux centres d'accueil. Même exercée à l'égard de personnes présentant certains problèmes ou déficiences, elle ne leur est pas particulière.

Il existe en effet de nombreux endroits où sont hébergées des personnes âgées dont l'autonomie est plus restreinte et qui, tout en n'ayant pas besoin de soins constants, doivent simplement vivre dans des lieux où [. . .] certains services d'entretien leur sont assurés. Elles peuvent en outre y retrouver une présence susceptible d'apporter une forme d'aide et de secours au besoin. Sans compter des services externes qui leur sont offerts de la même façon que si elles demeuraient ailleurs.

Auparavant, ces personnes retrouvaient ce type d'hébergement à l'intérieur d'une cellule familiale élargie. Maintenant, cette ressource est moins disponible et elles doivent avoir accès à des lieux différents.

De l'avis de la Commission, ce n'est pas à ce type de lieu d'hébergement que fait allusion le pouvoir de relocalisation dont dispose le ministre à l'article 182 [*L.S.S.S.S.*]. Ce pouvoir, qui est particulier et exceptionnel, est une mesure accessoire pour sanctionner une infraction commise à la loi. Celle-ci consiste à exploiter un établissement sans permis (art. 136).

Or l'établissement est vraiment une *installation* dont les activités doivent être orientées d'une façon telle que des soins particuliers relativement constants puissent être dispensés aux personnes qui y sont hébergées et qui les requièrent. Ce n'est pas un lieu dont l'activité consiste principalement à loger et entretenir des personnes qui, occasionnellement, peuvent avoir besoin de certains soins, et à qui il apporte un encadrement sécurisant et bénéfique.

Il ne faut pas isoler le pouvoir de relocalisation du ministre mais le situer dans son contexte. Sinon, il pourrait être utilisé pour transférer une ou des personnes

activities of the kind described in s. 1(*k*) are carried on and where care may be provided from time to time but which are not truly facilities for this purpose. Examples of this are families where an elderly or handicapped person lives. [Emphasis added; italics in original.]

d'endroits où des activités de la nature décrite à l'article 1*k*) sont exercées et où des soins peuvent occasionnellement être fournis mais qui ne sont pas véritablement des installations à cette fin. On n'a qu'à penser à titre d'exemple à des familles hébergeant une personne âgée ou handicapée. [Je souligne; italiques dans l'original.]

There is no doubt that the factual background to that decision is completely different from the case at bar; the same is true of the section of the Act relied on in support of these arguments. The first passage underlined in the extract nevertheless suggests that the rental portion of La Champenoise might not be classified as a reception centre. That does not prevent me from coming to the opposite conclusion. The type of lodging referred to by the Commission is inconsistent with the concept of an organized institution. This follows from the last phrase underlined above, when the Commission mentions facilities which are not created for the purposes of providing the services described in s. 1(*k*) *A.H.S.S.S.* In the present case La Champenoise is an organized institution which was specifically created for the purpose of catering to the special needs of the elderly.

Il ne fait pas de doute que le contexte factuel qui sous-tend cette décision est entièrement différent du cas qui nous occupe; de même en est-il de l'article de loi qu'on invoque au soutien de ces prétentions. Le premier passage souligné dans l'extrait laisse néanmoins entendre que la section locative de La Champenoise pourrait ne pas être qualifiée de centre d'accueil. Ceci ne m'empêche pas d'en arriver à la conclusion contraire. En effet, le type d'hébergement auquel la Commission fait référence s'oppose à la notion d'institution organisée. Ceci ressort du dernier membre de phrase souligné plus haut lorsque la Commission traite des installations qui ne sont pas créées aux fins de fournir les services décrits à l'al. 1*k*) *L.S.S.S.S.* Or, en l'espèce La Champenoise est une institution organisée que l'on a spécifiquement créée dans le but de répondre aux besoins particuliers des personnes âgées.

Another argument put forward by the respondents to show that La Champenoise cannot be classified as a reception centre in its entirety relies on the reasons of Bisson C.J.Q., when he noted that the composition of the board of directors and the criteria for admission to La Champenoise are not in accordance with the respective requirements of ss. 82 and 18.1 *A.H.S.S.S.* With respect, reading ss. 82 and 76 *A.H.S.S.S.* together with the heading of the division covering them clearly shows that s. 82 applies only to public establishments. Clearly, therefore, it cannot be made to cover La Champenoise. As for s. 18.1 *A.H.S.S.S.*, which obviously applies to public and private establishments, it provides for the submission of admission criteria to the Conseil régional de la santé et des services sociaux or the Minister, as the case may be. There is nothing to indicate, however, that failure to observe this requirement will as such affect the status of an establishment as a reception centre.

Un autre argument des intimées pour démontrer que La Champenoise ne peut être qualifiée entièrement de centre d'accueil prend appui sur les motifs du juge en chef Bisson de la Cour d'appel lorsqu'il souligne que la composition du conseil d'administration et les critères d'admission de La Champenoise ne se conforment pas aux exigences respectives des art. 82 et 18.1 *L.S.S.S.S.* Avec respect, la lecture conjointe des art. 82 et 76 *L.S.S.S.S.*, de même que l'en-tête de la section qui les gouverne, démontrent clairement que l'art. 82 ne s'applique qu'aux établissements publics. On ne saurait donc s'en prévaloir à l'endroit de La Champenoise. Quant à l'art. 18.1 *L.S.S.S.S.*, qui s'applique visiblement aux établissements publics et privés, il prescrit la soumission des critères d'admission au Conseil régional de la santé et des services sociaux ou au Ministre, selon le cas. Rien n'indique cependant que le défaut de respecter cette exigence affecte en soi le statut de centre d'accueil d'un établissement.

The respondents submitted, finally, that a reception centre is not exempt from real estate taxes if it does not hold a permit required by Division VI of the *A.H.S.S.S.* As La Champenoise holds a permit for 20 residents, the tax exemption could not be valid for its facilities in their entirety but should be limited to the shelter section only. In support of this argument the respondents relied on s. 204(14) *A.M.T.*, which does not define a reception centre as such but rather proceeds by way of a reference to s. 12 *A.H.S.S.S.* Such a reference, they argued, is not limited to the definition of a reception centre but also takes in the provisions of the Act governing the activities of this type of establishment. I shall again reproduce the paragraph for the sake of convenience:

204. The following are exempt from all municipal or school real estate taxes:

. . .

(14) an immoveable belonging to a public establishment within the meaning of the Act respecting health services and social services (chapter S-5), including a reception centre contemplated in section 12 of that act, used for the purposes provided by that act, and an immoveable belonging to the holder of a day care centre permit or nursery school permit contemplated in paragraph 1 or 2 of section 4 or 5 of the Act respecting child day care (chapter S-4.1), used for the purposes provided by that act;

With respect, I cannot subscribe to the respondents' arguments. If the legislature had intended that the tax exemption of a reception centre should be subject to the existence of a permit issued by the proper authority, it would have said so expressly as it did for day-care centres. The same textual argument can be drawn from s. 204(15) *A.M.T.* with respect to educational institutions. *Expressio unius est exclusio alterius*. I accordingly share the findings of the BREF on this point.

VI — Conclusion

In light of the rules of interpretation formulated in the first part of this analysis, it appears that on the facts found by the BREF the facilities of La

Les intimées soumettent finalement qu'un centre d'accueil n'est pas exempt de taxes foncières s'il n'est pas détenteur du permis exigé par la Section VI de la *L.S.S.S.S.* Comme La Champenoise détient un permis pour 20 bénéficiaires, l'exemption fiscale ne saurait être valable pour l'ensemble de ses installations mais devrait se limiter à la seule section hébergement. Pour étayer cet argument, les intimées s'appuient sur le par. 204(14) *L.F.M.* qui ne définit pas comme tel le centre d'accueil mais qui procède plutôt par un renvoi à l'art. 12 *L.S.S.S.S.* Un tel renvoi ne serait pas limité à la définition du centre d'accueil mais engloberait également les dispositions de la loi régissant les activités de ce type d'établissement. Je reproduis le paragraphe à nouveau pour des motifs de commodité:

204. Sont exempts de toute taxe foncière, municipale ou scolaire:

. . .

14° un immeuble appartenant à un établissement public au sens de la Loi sur les services de santé et les services sociaux (chapitre S-5), y compris un centre d'accueil visé à l'article 12 de cette loi, et qui sert aux fins prévues par cette loi, et un immeuble appartenant au titulaire d'un permis de service de garde en garderie ou en jardin d'enfants visé au paragraphe 1° ou 2° de l'article 4 ou 5 de la Loi sur les services de garde à l'enfance (chapitre S-4.1), et qui sert aux fins prévues par cette loi;

Avec égards, je ne peux souscrire aux arguments des intimées. En effet, si le législateur avait voulu que l'exemption de taxes d'un centre d'accueil soit subordonnée à l'existence d'un permis délivré par l'autorité compétente, il l'aurait expressément mentionné comme il l'a fait pour les garderies. Le même argument de texte peut être tiré du par. 204(15) *L.F.M.* à l'égard des institutions d'enseignement. *Expressio unius est exclusio alterius*. Je partage donc les conclusions du BREF sur cette question.

VI — Conclusion

À la lumière des principes d'interprétation établis dans la première partie de notre analyse, il appert que la totalité des installations de La Cham-

Champenoise can be classified in their entirety as a reception centre within the meaning of ss. 1(*k*) and 12(*b*) *A.H.S.S.S.* Similarly, it appears that its property as a whole is used for the purposes provided by that Act, as stipulated by s. 204(14) *A.M.T.* The decision of the BREF, a specialized tribunal, discloses no error subject to review on appeal. I would accordingly restore the decision of the BREF that the La Champenoise property should be declared exempt from real estate taxes in its entirety for the 1980 to 1984 fiscal years inclusive.

VII — Disposition

The appeal is allowed. The judgment of the Quebec Court of Appeal is set aside and the decision of the BREF is affirmed, the whole with costs before the BREF and in all courts.

Appeal allowed with costs.

Solicitors for the appellant: Tremblay Bois & Associés, Ste-Foy.

Solicitors for the respondents the Communauté urbaine de Québec and the City of Québec: Alain, Tardif & Associés, Québec.

Solicitors for the respondent the Attorney General of Quebec: Rochette Boucher & Gagnon, Québec.

penoise, selon les faits constatés par le BREF, peut être qualifiée de centre d'accueil au sens des al. 1*k*) et 12*b*) *L.S.S.S.S.* Il appert de même que l'ensemble de son immeuble sert aux fins prévues par cette loi, comme le prescrit le par. 204(14) *L.F.M.* La décision du BREF, tribunal spécialisé, ne fait pas voir d'erreur susceptible de fonder réformation en appel. En conséquence, je rétablirais la décision du BREF afin que l'immeuble de La Champenoise soit entièrement déclaré exempt de taxes foncières pour les exercices financiers des années 1980 à 1984 inclusivement.

VII — Dispositif

Le pourvoi est accueilli. Le jugement de la Cour d'appel du Québec est infirmé et la décision du BREF est confirmée, le tout avec dépens devant le BREF et toutes les cours.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante: Tremblay Bois & Associés, Ste-Foy.

Procureurs des intimées la Communauté urbaine de Québec et la ville de Québec: Alain, Tardif & Associés, Québec.

Procureurs de l'intimé le procureur général du Québec: Rochette Boucher & Gagnon, Québec.

TAB 3

1530C

Assessment Review Board
Commission de révision de l'évaluation foncière

Ontario

ISSUE DATE: February 12, 2015 **FILE NO.:** DM 2014M6

Moving Party(ies):	Brian Scott and Teresa Scott
Respondent(s):	Municipal Property Assessment Corporation ("MPAC"), Region 15
Respondent(s):	City of Brampton
Property Location(s):	34 Louvre Circle
Municipality(ies):	City of Brampton
Roll Number(s):	2110-120-003-36400-0000
Appeal Number(s):	2889707, 2889708, 2889709, 2889710, 2889711, 2915533 and 2982477
Taxation Year(s):	2008, 2009, 2010, 2011, 2012 and 2013
Hearing Event No.:	554076
Legislative Authority:	Sections 33 and 40 of the *Assessment Act*, R.S.O. 1990, c. A.31, as amended
Heard:	April 25, 2014 in Brampton, Ontario

APPEARANCES:

Parties	**Counsel[+]/Representative**
B. Scott and T. Scott	Self-represented
MPAC	K. Lunau[+]
City of Brampton	A. Karreman

DISPOSITION OF THE BOARD DELIVERED BY VINCENT STABILE

INTRODUCTION

[1] The motion before the Assessment Review Board ("Board") is a motion by the assessed persons pursuant to s. 40.1 of the *Assessment Act* RSO 1919 chapter A.31 as amended ("Act"), for:

- An order extending the time for bringing an appeal with respect to the 2008 and 2009 taxation years.
- An order directing Municipal Property Assessment Corporation ("MPAC") to be the appellant.

Documents Filed

[2] Brian Scott and Teresa Scott ("Scotts'") filed a large binder containing two Affidavits of Teresa Scott, sworn March 23, 2014 and July 25, 2014. The affidavit of March 23, 2014, was identified as a Supplementary Affidavit. There were numerous exhibits to the Affidavits, consisting of 210 pages.

[3] Karey Lunau, counsel for MPAC, filed a document brief containing an Affidavit of John Cole, sworn July 31, 2012.

[4] Oral submissions were made at the hearing of the motion.

[5] For the Scotts, Ms. Scott was the primary speaker however she was assisted by Mr. Scott, throughout.

[6] The City of Brampton was represented, however no documents were filed and no oral submissions were made by the representative.

DISPOSITION OF MOTION

[7] Upon reading the parties' Motion Records, briefs of authorities, hearing the submissions of both assessed persons and the submissions of counsel for MPAC, the Board finds that that there was no evidence to support a finding of palpable error in respect to the 2008 and 2009 taxation years. Accordingly, the motion is denied.

[8] The Board orders that all appeals as noted on the docket, s. 33 appeals for 2008 and 2009 and s. 40 appeals for taxation years 2010, 2011, 2012, 2013 and deemed appeal(s) for 2014, be scheduled for hearing, with notices to all parties.

REASONS FOR DISPOSITION OF MOTION

[9] The essential submission of the Scotts was that MPAC had made palpable errors, as contemplated under s. 40.1(b) of the Act, in the assessment of the subject property for the taxation years 2008 and 2009. Accordingly, the time for appeals for those taxation years should be extended and MPAC should be the appellant.

[10] The palpable errors alleged were:

- Wrong lot size
- Wrong garage size
- MPAC failed to investigate and/or inspect the subject property when MPAC received six building permits from the Municipality during the years 2007 and 2008.

[11] The majority of the documents attached to the Affidavit of Teresa Scott, filed, were in respect to remedial work done as a result of structural defects discovered after the purchase of the home.

[12] The subject property is a two-storey residential home built in 2005.

[13] The Scotts purchased the home new from the builder, with a finished basement, for $619,000. They took possession on June 30, 2005.

[14] It is conceded that structural defects were discovered. The defects were cured for a total cost exceeding $408,000. Tarion Warranty Corporation ("Tarion") paid in excess of $358,000. The builder evidently paid $50,000. The remedial work was controlled by Tarion.

[15] Tarion applied for and received six building permits from the City of Brampton. In due course, the City of Brampton forwarded the building permits to MPAC. Set out below are dates that the building permits were issued by the City of Brampton and the dates received by MPAC:

Dates Issued	**Dates received by MPAC**
• November 29, 2007	December 14, 2007
• June 3, 2008	July 18, 2008
• July 17, 2008	September 22, 2008
• July 24, 2008	September 22, 2008
• September 16, 2008	October 22, 2008
• October 20, 2008	November 24, 2008

[16] It is also conceded that while the remedial work was being carried out, the basement of the subject home was not usable.

[17] The family, being Brian Scott, Teresa Scott and their five children, continued to live in the home. This was confirmed in Ms. Scott's oral submissions. She did say that on a few occasions the family made other arrangements. I understood her to say that they stayed with other family members on those occasions.

[18] The occupancy permit for the home was never cancelled by the City of Brampton.

[19] The Scotts confirmed receiving the usual Assessment Notices from MPAC, however a Request for Reconsideration ("RFR") was not filed for the 2008 or 2009 taxation years. It follows, that appeals were not filed with the Board for those taxation years.

[20] There is some evidence that MPAC attempted to inspect the property in March 2009 and February 2010.

[21] Following a Board Order, the property was inspected on May 7, 2012. As a result of that inspection, the following recommendations were made by MPAC:

- The lot area should be changed from 9,251.96 sq. ft. to 8,946.96 sq. ft. This would result in a decrease in value of $2,000.
- The garage area should be decreased from 679 sq. ft. to 618 sq. ft. This would result in a decrease in value of $3,000.
- The quality class should be changed from 7 to 7.5.
- The value of the property should be further reduced for outstanding repairs required for the roof and windows by $44,000.

[22] Ms. Scott conceded that RFRs were not filed for 2008 or 2009 taxation years. She submitted, however, that she relied on MPAC to consider the building permits it was receiving from the City of Brampton as their RFR.

[23] Ms. Scott stressed continuously that "MPAC had assessed a home which did not exist or a home that was not there".

[24] In summary, Ms. Scott submitted that MPAC had made three palpable errors:

- It assessed a property with an incorrect lot size.
- It assessed a property with an incorrect garage size.

- It failed to investigate and/or inspect the subject property when it received the building permits noted above. In any event, MPAC assessed a home which did not exist or a home which was not there.

[25] Counsel for MPAC referred and relied upon the Affidavit of John Cole, sworn July 31, 2012, which, in part, stated that if MPAC had received RFRs it would have requested an inspection of the property and thereby be able to deal with issues of valuation for the subject property.

[26] Counsel submitted that errors in assessments are expected.

[27] She submitted that the errors relating to the size of the lot or the garage area cannot be categorized as palpable errors, but merely valuation issues.

[28] With respect to the building permits, she submitted that it would be wrong to impose a duty on MPAC to review any and all building permits received in respect to the subject property or any property in Ontario, for purposes of assessments. She stated that there are now in excess of 4.5 million parcels of land registered in the Province of Ontario.

[29] Ms. Lunau submitted that the onus of "policing" for purposes of raising assessment issues is and should remain with the assessed person or entity.

[30] Further, she submitted that although the Act does not provide for a limitation period for the Board to consider motions, such as this, under s. 40.1(b) of the Act, she stated that most if not all other related legislation does. Thus the Board should consider any delay in bringing such motions since the City of Brampton is entitled to some measure of "finality" in respect to the assessment of properties falling within its jurisdiction.

[31] No other submissions were made by or on behalf of the City of Brampton.

Legislation

[32] Section 40.1 of the Act states:

> **40.1 Correction of errors**. -- If it appears that there are palpable errors in the assessment roll,
> (a) if no alteration of assessed value or classification of land is involved, the Board may correct the roll; and
> (b) if alteration of assessed values or classification of land is involved, the Board may extend the time for bringing appeals and direct the assessment corporation to be the appellant

Analysis

[33] The order requested by the Scotts is based on 'palpable errors' purportedly made by MPAC.

[34] According to The New Shorter Oxford Dictionary, palpable error may be defined as "an error of conspicuous magnitude; plain, evident, obvious, and easy to understand".

Discussion

[35] Palpable error is an extra-ordinary remedy to be applied sparingly and only in the clearest of circumstances.

[36] The general scheme of the Act is to provide a basis for assessments of all properties in the Province so that the burden may be shared.

[37] The onus rests with MPAC to ensure that properties are assessed correctly in order to satisfy the scheme of the Act.

[38] Once Notices of Assessment are delivered, it is the responsibility of the assessed person(s) or entities to raise issues in respect to those assessments.

Case Law

[39] The Scotts filed numerous decisions for the Board's consideration. On consent, the list of cases was reduced to those identified and summarised below:

- *Norjohn Transfer Systems Inc. v. Municipal Property Assessment Corporation, Region No. 15 (Norjohn),* [2007] O.A.R.B.D. No. 464. This decision stands for the proposition that s. 40.1 of the Act is a remedial provision to permit the correction of plain and obvious errors in the assessment roll and that there is no time restriction imposed in the Act for the correction of a palpable error.

- *Norjohn* is instructive in understanding and applying s. 40.1 of the Act. I do not find plain and obvious errors in the assessment roll under consideration, thus this decision does not assist the Scotts.

- *Whitby (Town) v. Municipal Property Assessment Corporation, Region No. 13 (Whitby),* [2004] O.A.R.B.D. No. 218. This was an appeal by MPAC and the Municipality, both seeking an increase in the assessment of the subject development lands. MPAC sought the increase pursuant to s. 40.1 of the Act based on palpable error. The Municipality sought the same increase under s. 40 of the Act alleging that the assessment was too low. The subject property was a large residential subdivision comprising various building lots and blocks. The plan of subdivision had been registered prior to the close of the assessment roll however the lots and blocks were assessed as a single vacant parcel of land. After a full hearing, Member Wyger increased the assessments and found that assessing the property as a single parcel of vacant land constituted a palpable error.

- *Whitby* is clearly distinguishable from the case put forth by the Scotts. Various building lots had been created by virtue of the registration of the subdivision that were not individually assessed due to the late registration. This case does not assist the Scotts.

- *1012419 Ontario Ltd. v. Municipal Property Assessment Corporation, Region No. 9 (1012419),* [2009] O.A.R.B.D. No. 68. This was a motion under s. 40.1(b) of the Act, based on palpable error. The properties under consideration were servient tenements, separate laneways, to thirteen dominant tenements. The submissions were that the servient tenements had been over-assessed, in that added value had already been factored into the assessment of the dominant tenements. The motion was denied as there was no evidence of the over-assessment itself to support a finding of a palpable error. The decision also reviews the general scheme of the Act for purpose of assessment and the authority of the Board under s. 44.(1) of the Act to correct omissions and errors which need not be necessarily palpable.

- *1012419 Ontario* deals with separate parcels of land, deemed servient tenements. Although the issue raised was in respect to assessments, this decision is clearly distinguishable and does not assist the Scotts in their motion. In any event, the motion in 1012419 was denied.

- *Greenberg v. Municipal Property Assessment Corporation, Region No. 3 (Greenberg),* [2006] O.A.R.B.D. No. 71. This was a hearing under s. 40 of the Act. The complainants submitted that their property had been over-assessed because of structural defects and their inability to enjoy their home. The cost to repair was $335,000. The complainants developed medical problems as result of the condition of their home. On advice of their medical doctor, they vacated the premises for 11 months. The complainants evidently stated that they were encouraged to appeal their

assessments by MPAC as it (MPAC) was aware of the problems with their property. The Member found that the property had been over-assessed and reduced the value from $346,00 to $40,000 for one year and from $407,000 to $50,000 the second year.

- *Greenberg* may assist the Scotts at a hearing as the central issue is one of valuation. It does not assist in respect to a motion based on palpable error.

- *D'Angela v. Municipal Property Assessment Corporation, Region No. 14 (D'Angela),* [2010] O.A.R.B.D. No. 325. This was a hearing under s. 40 of the Act. The appellant submitted that he had overpaid for the home at a time that he was experiencing extraordinary duress respecting a family health issue. Accordingly, he urged the Board not to take the purchase price ($2,150,000) as indicative of the correct current value. MPAC had assessed the property at $1,768,000 but reduced it to $1,747,000 to reflect the year built. The Board found $1,747,000 to be reasonable, based on the evidence.

- *D'Angela* is a decision following a hearing, not a motion requesting an extension to file an appeal based on palpable error.

- *Sarnia (City) v. Municipal Property Assessment Corporation, Region No. 26 (Sarnia),* [2011] O.A.R.B.D. No. 392. This was a motion by the City Of Sarnia under s. 40.1 of the Act seeking an order creating appeals on the basis of a palpable error made since the incorrect class and values had been returned on the roll for three properties which were multi-residential but converted to condominium shortly before the return of the roll. Supplementary assessments had been issued changing the classification, but not the assessed values. The City did not appeal the original returned assessments or the supplementary assessments. The motion was dismissed.

- *Sarnia* supports my decision on this motion. The City failed to appeal the assessments. That was not considered to be a palpable error. The Scotts are in the same situation.

- *Municipal Property Assessment Corporation, Region No. 15 v. Marcoccia (Marcoccia),* [2011] O.A.R.B.D. No. 142. This was a hearing dealing with a question of whether the selection by MPAC of an incorrect date for the effective date of an omitted assessment of the property under consideration was a palpable error pursuant to s. 40.1 of the Act. The panel was satisfied that the selection of the wrong date constituted a palpable error and therefore granted relief.

- *Marcoccia* does not deal with valuation issues. Rather, it deals with the effective date for an assessment to be implemented. This case is clearly distinguishable and does not assist the Scotts.

- *1115571 Ontario Inc. v. Municipal Property Assessment Corporation, Region No. 9 (1115571),* [2012] O.A.R.B.D. No. 18 (DM 113873). This was a motion for similar relief being sought by the Scotts. The property under consideration was classified as commercial and was used as a laundry service. MPAC had changed the classification from commercial to industrial, following an inspection. However, the inspection card stated: "Property appears to be vacant, locked up, bills taped to door.....". Upon receiving a complaint from the owner, MPAC confirmed, in writing, that the correct classification was commercial. The classification however was not changed by the Municipality. The Municipality and MPAC both argued that there was delay by the assessed entity in bringing the motion. Further, they argued that granting the relief sought would be prejudicial to the Municipality. Member Birnie found that there is no time limit for the Board to extend the time for bringing appeals under s. 40.1. Further, he found that there was a palpable error and granted the relief sought.

- *1115571* was decided based on classification issues, admitted by MPAC. This does not assist the Scotts.

[40] Ms. Lunau relied upon the provisions of the legislation. Further, she filed various cases for consideration from which I have selected the following:

- *The Diocese of Toronto Camps (Anglican Church of Canada) v. Municipal Property Assessment Corporation* [2004] O.J. No. 443 (Docket C41401) at paragraph 15. This case stands for the proposition that provisions of taxing statutes are subject to the generally applicable rules of statutory interpretation. They are to be read in their statutory context having regard to the ordinary and grammatical meaning of the words used, the scheme and object of the statute, and the intention of the legislature.

- This is a principle applied by the Board.

- *Weston (George) Ltd. et al v. Toronto (City) et al (Weston), 43 O.A.C.* [2001] 366 at 375. This case stands for the proposition that the principle of "unjust enrichment" does not apply since the subject matter under consideration falls under the Act, a statutory code. The requirement to pay taxes is pursuant to statutory provisions. The common law cannot characterize competent jurisdiction as unjust.

- The issue of unjust enrichment was not forcefully argued by the Scotts. In any event the motion would not be granted on that basis alone. The City is entitled to collect taxes pursuant to the provisions of the Act.

- *Rotberg v. Ontario (Regional Assessment Commissioner, Region No. 20) (Rotberg),* [1981] O.J. No. 334. In this case Justice Fanjoy held that where the complainant did not file a notice of complaint within the time

stipulated under that Act, neither the Court nor the Board had jurisdiction to hear the appeal. Accordingly he declined to grant the relief sought.

- In *Rotberg*, the court limits the Board's jurisdiction when dealing with situations where the assessed parties failed to file a notice of complaint. The Scotts fall under the same classification.

- *Toronto (City) v. Wolf (Toronto),* [2008] O.J. No. 3061 (Crt. file no: 349/07 On. Div. Crt.). In this case the City of Toronto appealed a decision of the Board quashing two appeals by the City for failure by the City to comply with the notice provisions under the Act. Madam Justice Chapnik, writing for the panel, recognized the competing interests of the Act, to achieve equitable distribution of the tax burden and fairness to the taxpayer. She stated that balance is achieved by the informed right to complain coupled with a specific and firm limitation period in the governing legislation. The Court found that it was unreasonable to expect the City to make further inquiries once it complied with the initial process and believed that the notices issued would reach the assessed person. Under the circumstances, the matter was allowed to proceed to a hearing on the merits.

- *Toronto* clearly supports the right to be heard once satisfied that the party has complied with the process. The Scotts failed to comply.

[41] Given the nature of assessment complaints and resulting appeals generally, I am not satisfied that the errors complained of in this matter with respect to the size of the lot and/or the size of the garage can be seen as palpable errors as contemplated under s. 40.1(b) of the Act. These are valuation issues, to be dealt with by RFRs and subsequently appeals to the Board. Having reviewed the case law, I am persuaded that these valuation issues are not palpable errors.

[42] It is important for the Scotts to understand the distinction between a hearing and the motion argued here. It may well be that at a hearing under s. 40 of the Act, the structural defects enunciated would result in an adjustment of the assessed value of their home for the period of time the defects remained uncured. That however, does not assist them in meeting the test for a finding of palpable error(s).

[43] Ms. Scott forcefully argued that MPAC made an error in "assessing a home which did not exist or a home that was not there".

[44] Although there were substantial structural deficiencies which required rectification, the entire family continued to reside in the house, except for a "few occasions" as submitted by Ms. Scott.

[45] It would defy logic to accept the submission that the house did not exist or was not there.

[46] As it relates to the building permits issued at the request of Tarion, although they inform MPAC as to work done or anticipated being undertaken, I do not accept that the failure of MPAC to investigate the building permits issued in respect to the subject property is a palpable error, as contemplated under s. 40.1(b) of the Act. I am not persuaded by the submissions of the Scotts that knowledge of the structural status of the building should be imputed on MPAC, by virtue of building permits issued in respect to it.

[47] For these reasons, the motion is dismissed.

[48] Ms. Lunau submitted that although a limitation period is not provided under s. 40.1(b) of the Act, the Board should nevertheless consider imposing some sort of time limitation to give "finality for the Municipality".

[49] I decline to do so. The Board does not have inherent jurisdiction to depart from a plain reading of the applicable legislation and may only do so if there is a change in legislation by the Legislature or as otherwise directed by the Divisional Court or Court of Appeal.

[50] The appeals now pending (s. 33 appeals for 2008 and 2009 and s. 40 appeals for taxation years 2010, 2011, 2012, 2013 and deemed appeal(s) for 2014) are to be set for a hearing on a date to be determined by the Board, with notices to all parties, unless they have been disposed of by way of settlement or other agreement by the parties.

"Vincent Stabile"

VINCENT STABILE
MEMBER

TAB 4

at the time of purchase of the annuity, Ms. Hie pays $300,000 for a financial product that has a present value of between $52,000 to $193,000. In my opinion, it is appropriate to treat that type of transaction as within the first class of fraudulent conveyance cases.

[39] The last question is whether it has been proven that Ms. Hie had the intent to defeat, hinder, delay or defraud creditors. On this point, there is very little evidence beyond the facts that: (a) Ms. Hie did not defend this proceeding; (b) Mr. Salna has been delayed in enforcing his judgment; and (c) Ms. Hie used a portion of her settlement in a way that created an non-exigible asset from which she derives a benefit. In my opinion, this evidence is insufficient to establish a fraudulent intent.

[40] Apart from establishing a non-exigible asset, there are many benign motivations for structuring a settlement of a personal injury action including the motivation that a structured settlement may be the fairest way for the defendant to compensate the plaintiff for his or her income losses.

[41] Therefore, I dismiss this application, and I direct that the money already paid into court be paid out to Ms. Hie and Standard Life resume making annuity payments to Ms. Hie.

[42] Finally, there is the matter of costs. Standard Life did not ask for costs, and Mr. Salna did not ask for costs against Standard Life. As noted, Mr. Salna did ask for costs against Ms. Hie, but having regard to the outcome of this proceeding, I conclude that that there should be no order as to costs.

[43] Order accordingly.

Application dismissed.

1518756 Ontario Inc. et al. v. Municipal Property Assessment Corp. et al.

[Indexed as: 1518756 Ontario Inc. v. Municipal Property Assessment Corp.]

Superior Court of Justice, Pattillo J. November 16, 2007

Assessment — Interpretation — "Structure" — Former cruise ship being berthed in same space for over 30 years and being used as floating restaurant — Ship being "structure" within definition of "land" and "real property" in s. 1 of Assessment Act — "Structure" being item of substantial size which was built or constructed and which is intended by owner to remain permanently at its location — Assessment Act, R.S.O. 1990, c. A.31, s. 1.

Assessment — Interpretation — "Tenant" — Former cruise ship used as floating restaurant occupied its berthing space under a license agreement with Port Authority, a public commission — Ship being "tenant" within the meaning of the Act — Assessment Act, R.S.O. 1990, c. A.31, s. 3.9.

The Jadran, a 296-foot former cruise ship, had been berthed in the same space for more than 30 years and was used as a floating restaurant. It occupied its berthing space under a licence agreement with the Toronto Port Authority, which owned the lakebed beneath it. The owner of the Jadran and the Port Authority brought an application for a declaration that the Jadran and the land where it was located were exempt from taxation.

Held, the application should be dismissed.

Section 1 of the *Assessment Act* defines "land" and "real property" to include: "(*a*) land covered with water, . . . (*d*) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land, (*e*) all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water . . ." The Jadran was a "structure" within that definition. A "structure", as referred to in the definition, is an item of substantial size which has been built or constructed and which is intended by the owner to remain permanently at its location. Intention is a question of reasonable inference to be drawn from all the evidence. The item does not have to be permanently on a permanent foundation in order to be a "structure". The Jadran had been operated as a restaurant continuously since 1976, and there was no evidence that the owner intended to cease operating it as a restaurant at its present location. It was attached to the shore by mooring lines and connections for water, electricity and sewage. Its engines had not been operated since 1975, and it could not leave its location to cruise or otherwise travel without assistance. It was a reasonable inference that the owner intended the Jadran to remain permanently at its present location. As a "structure" which was placed upon water, over land, the Jadran was "land" and "real property" within the meaning of the Act.

Section 3.9 of the Act provides that real property owned by a public commission is exempt from taxation so long as it is not "occupied by a tenant who would be taxable if the tenant owned the land". The Port Authority was a public commission. The Jadran "occupied" the land of the Port Authority. While it was not a tenant in the common acceptance of the word, but rather a licensee of the premises, it was a "tenant" within the meaning of the Act. It paid a monthly sum similar to rent to the Port Authority, had exclusive possession of the premises, and occupied almost the entire licensed premises. Therefore, the exemption in s. 3.9 of the Act did not apply.

Herbstreit v. Regional Assessment Commissioner, Assessment Region No. 15 (1982), 38 O.R. (2d) 642, [1982] O.J. No. 3465, 138 D.L.R. (3d) 97, 19 M.P.L.R. 162 (Co. Ct.), **apld**

British Columbia Forest Products Ltd. v. Canada (Minister of National Revenue), [1972] S.C.R. 101, [1971] S.C.J. No. 92, 19 D.L.R. (3d) 657; *Cardiff Rating Authority v. Guest Keen Baldwins Iron & Steel Co.*, [1949] 1 All E.R. 27, 1 K.B. 385 (C.A.); *R. v. Springman*, [1964] S.C.R. 267, [1964] S.C.J. No. 8, **consd**

RivTow Industries v. British Columbia (Assessment Commissioner), [1986] B.C.J. No. 31, 24 D.L.R. (4th) 475, 70 B.C.L.R. 194 (C.A.); *Star of Fortune Gaming Management (BC) Ltd. v. British Columbia (Assessor of Area No. 10 — Burnaby/*

New Westminster), [2002] B.C.J. No. 1563, 2002 BCSC 1002, 114 A.C.W.S. (3d) 989, **distd**

Other cases referred to

Lyons v. Meaford (Town), [1978] O.J. No. 24, 6 M.P.L.R. 245, [1978] 2 A.C.W.S. 234 (C.A.), revg [1977] O.J. No. 1320, 2 M.P.L.R. 121 (Div. Ct.); *Northern Broadcasting Co. v. Mountjoy (Improvement District)*, [1950] S.C.R. 502, [1950] S.C.J. No. 19, [1950] 3 D.L.R. 721; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, [1994] S.C.J. No. 78, 63 Q.A.C. 161, 171 N.R. 161, 95 D.T.C. 5017; *R. v. Bedard*, [1978] 1 S.C.R. 1096, [1977] S.C.J. No. 105, affg [1976] O.J. No. 833, 20 N.R. 427, 31 C.C.C. (2d) 559 (C.A.); *Stinson v. The Township of Middelton*, [1949] O.R. 237, [1949] O.J. No. 449, [1949] 2 D.L.R. 328 (C.A.)

Statutes referred to

Assessment Act, R.S.B.C. 1996, c. 20
Assessment Act, R.S.O. 1970, c. 32, s. 1(*k*)
Assessment Act, R.S.O. 1980, c. 31
Assessment Act, R.S.O. 1990, c. A.31, as am., ss. 1 "land", "real property", 3, 3.1, 46
Criminal Code, R.S.C. 1970, c. C-34, s. 389(1)(*a*)
Criminal Code, S.C. 1953-54, c. 51, s. 374(1)(*a*)
Income Tax Act, R.S.C. 1952, c. 148
Rating and Valuation Act, 1925 (U.K.), 15 & 16 Geo. V, c. 90

APPLICATION for declaration that a ship and the land where it was berthed were exempt from taxation.

J.G. Cowan, for applicant.
Chester Gryski, for respondent Municipal Property Assessment Corporation.

PATTILLO J.: —

Introduction

[1] The M.S. Jadran ("Jadran") is a 296-foot former cruise ship, which has been berthed at the foot of Yonge Street in the City of Toronto for more than 30 years. It is owned by the applicant, 1518756 Ontario Inc., and is used as a floating restaurant and banquet facility, open to the public, under the name of "Captain John's". The Jadran occupies its berthing space in the waters of Lake Ontario in accordance with a license agreement with the applicant, The Toronto Port Authority, who owns the lakebed beneath it. Both the land and the Jadran have been assessed by the respondent, Municipal Property Assessment Corporation.

[2] The applicants request a declaration that the Jadran is exempt from assessment and taxation and that the land where the Jadran is located, owned by the Port Authority, is also exempt from taxation. The issues for decision on the application are:

(1) Whether the Jadran is liable for assessment as "real property" within the meaning of s. 1 of the *Assessment Act*, R.S.O. 1990, c. A.31, as amended (the "Act"), and more specifically, whether the Jadran is a "structure" within s. 1(*d*) of the Act; and

(2) Whether the Jadran occupies "real property" within the meaning of s. 1 of the Act.

Preliminary Matter

[3] The application was originally commenced by the applicant Corporation, and the Port Authority was named as a respondent. In its materials, the Assessment Corporation took the position that because the applicant Corporation was not the owner of the property assessed, it was not the person assessed and, therefore, in accordance with s. 46 of the Act, it had no status to bring the application. At the outset of the argument, I was advised that the issue of entitlement to bring the application was no longer an issue and the Port Authority would be added as an applicant and removed as a respondent and the style of cause amended accordingly. Such an order shall issue on consent.

Is the Jadran "Real Property" within the meaning of section 1 of the Act?

[4] Section 3 of the Act provides that all real property in Ontario is liable to assessment and taxation, subject to certain stated exemptions that are not relevant to this application. Section 1 of the Act defines "land" and "real property" to include:

> (*a*) land covered with water,
>
> . . . . .
>
> (*d*) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land,
>
> (*e*) all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water, but not the rolling stock of a transportation system.

[5] The applicant Corporation submits that the Jadran is not a "structure" within the Act's definition of real property. Rather, it is a ship or vessel. In order to resolve the issue on this application it is necessary to determine what is meant by the word "structure" as it is used in the definition of "land" and "real property" in the Act.

[6] The Act is a taxing statute. In *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3,

[1994] S.C.J. No. 78, at p. 20 S.C.R., the Supreme Court of Canada set out the rules applicable to the interpretation of tax legislation. The interpretation should follow the ordinary rules of statutory interpretation. The teleological or purposive approach should be employed. The provision in question should be given a strict or liberal interpretation depending on the purpose underlying it. Where, after application of the ordinary rules, a reasonable doubt as to the meaning remains, the doubt is to be resolved having recourse to the "residual presumption" in favour of the taxpayer.

[7] I start with the ordinary meaning of "structure". It is very broad. The *Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) defines the noun "structure" as: "The whole constructed unit, especially a building, a set of interconnected parts of any complex thing." The *New Shorter Oxford Dictionary* (Oxford: Clarendon Press, 1993) defines it as: "A thing which is built or constructed; a building, an edifice. More widely, any framework or fabric of assembled material parts; an organized body, a combination of mutually connected and dependent parts."

[8] Courts, both within Canada and beyond, have considered the meaning of the word "structure" in different statutory provisions. The applicant Corporation submits that the definition of structure as enunciated by Lord Denning in *Cardiff Rating Authority v. Guest Keen Baldwins Iron & Steel Co.*, [1949] 1 All E.R. 27, 1 K.B. 385 (C.A.), having been referred to with approval by the Supreme Court of Canada, is the law in Canada and I should apply it in this case.

[9] *Cardiff Rating Authority* involved the question of whether certain moveable tilting furnaces and gas and blast mains were ratable pursuant to an order made under the *Rating and Valuation Act, 1925* (U.K.), 15 & 16 Geo. V, c. 90. The words of the order being considered provided: "The following parts of a plant or a combination of plant and machinery wherever and only to such extent as any such part is, or is in the nature of, a building or structure." The Court of Appeal concluded, upholding the decision of the Divisional Court, that the items in question came within the meaning of the order and were accordingly ratable. Denning L.J. and Jenkins J. each wrote reasons supporting the court's decision. Lord Denning distinguished between a structure and something in the nature of a structure, stating at p. 31 All E.R. of the decision:

> In the present case the learned recorder seems to have thought that these were not structures or in the nature of structures because they were moveable. In my opinion, that was misdirection. A structure is something which is constructed, but not everything which is constructed is a structure. A ship,

> for instance, is constructed, but it is not a structure. A *structure* is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation, but it is still a structure even though some of its parts may be moveable, as, for instance, about a pivot. Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a *structure*, but it may be "in the nature of a structure" if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site. Thus, a floating pontoon, which is permanently in position as a landing stage beside a pier, is "in the nature of a structure," even though it moves up and down with the tide and is occasionally removed for repairs or cleaning.

[10] Jenkins J., in his reasons, looked at the words under consideration as a whole and did not distinguish between structures and in the nature of structure, stating at p. 36 All E.R.:

> It would be undesirable to attempt, and indeed, I think impossible to achieve, any exhaustive definition of what is meant by the words "a building or structure or in the nature of a building or structure." They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think in addition to coming within this general range, the things in question must, *in relation to the hereditament*, answer the description of buildings or structures or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size — I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, *i.e.*, things which, once installed on the hereditament, would normally remain *in situ* and only be removed by a process amounting to pulling down or taking to pieces.

[11] *Cardiff Rating Authority* and, specifically, Lord Denning's *dicta*, has been referred to with approval by the Supreme Court of Canada in two separate decisions: *R. v. Springman*, [1964] S.C.R. 267, [1964] S.C.J. No. 8, and *British Columbia Forest Products Ltd. v. Canada (Minister of National Revenue)*, [1972] S.C.R. 101, [1972] S.C.J. No. 92.

[12] In *Springman*, the court considered the question of whether bunkhouses and an office, mounted on wheels for movement from place to place, were "buildings" or "structures" within the then s. 374(1)(*a*) of the *Criminal Code*, S.C. 1953-54, c. 51 in respect of a charge of arson. In concluding that they were, Hall J., for the court, cited with approval the *dicta* of Denning L.J. but noted, at p. 273 S.C.R., that the court was not dealing with anything "that is in the nature of a structure". Taschereau C.J.C., in separate reasons, concurred in the result but based his decision on the distinction between movable and immovable property.

[13] In *B.C. Forest Products*, *supra*, the Supreme Court of Canada considered whether certain tanks and a chemical recovery unit situated outside a building were a "building or other structure"

under the *Income Tax Act*, R.S.C. 1952, c. 148 for the purpose of capital cost allowance. In determining what was a structure, Martland J., on behalf of the court, referred to the above *dicta* of Denning L.J., noted that it had been cited by the court by Hall J. in *Springman,* and stated that the test as set forth by Lord Denning could be properly applied to the facts of the case.

[14] In *R. v. Bedard*, [1976] O.J. No. 833, 31 C.C.C. (2d) 559 (C.A.), the Court of Appeal dealt with an appeal of an acquittal from two charges under the *Criminal Code*, R.S.C. 1970, c. C-34 of willfully setting fire to two structures. The "structures" in question were two trailers used for residential purposes and located in a trailer park. Each trailer had been towed to the trailer park, had its wheels removed and was mounted on a concrete block foundation. The issue was whether the trailers were "structures" within the meaning of s. 389(1)(*a*) of the *Criminal Code*. Howland J.A. (as he then was) wrote the decision for the court allowing the appeal. After reviewing in some detail the cases dealing with the meaning of "structure" including *Cardiff Rating Authority, Springman* and *B.C. Forest Products*, Howland J.A. held that a structure within s. 389(1)(*a*) was one that was made with the intention that it would continue indefinitely in its present location and not be temporary and ready for movement.

[15] In reaching his decision in *Bedard*, Howland J.A. distinguished Lord Denning's statement in *Cardiff Rating Authority* that one of the characteristics of a structure was "intended to remain permanently on a permanent foundation" by indicating that Denning L.J. was interpreting the meaning of three different concepts: buildings, structures, and things in the nature of structures, whereas in s. 389(1)(*a*) he had only to consider the meaning of the words "building or structure".

[16] An appeal to the Supreme Court of Canada in *Bedard* was dismissed in brief oral reasons, [1978] 1 S.C.R. 1096, [1978] S.C.J. No. 105.

[17] In *Lyons v. Meaford (Town)*, [1978] O.J. No. 24, 6 M.P.L.R. 245 (C.A.), the Court of Appeal considered whether walk-in coolers used to refrigerate perishable items in the applicant's retail grocery business were land or real property within the meaning of s. 1(*k*)(iv) of the *Assessment Act*, R.S.O. 1970, c. 32. That section was identical to s. 1(*d*) of the definition of land and real property under consideration in the case at bar. The case proceeded on the basis that the coolers were part of a building or structures and the issue was whether they were erected or placed upon or fixed to land.

[18] In dealing with the issue in the first instance, Thompson J. reviewed the authorities that dealt with the interpretation of the

section and concluded, following the test laid down by Kellock J. in *Northern Broadcasting Co. v. Mountjoy (Improvement District)*, [1950] S.C.R. 502, [1950] S.C.J. No. 19, [1950] 3 D.L.R. 721, that the test to be applied was: "were the articles placed upon the property with the intention that their original location should have some degree of permanency?"

[19] In *Northern Broadcasting*, *supra*, the Supreme Court of Canada considered the issue of whether at law certain machinery that was merely "placed" on land without having acquired the character of land fell within the definition of land in s. 1(*k*)(iv) of the *Assessment Act*. Kellock J., for the majority, held that the word "placed" in the section involved more than simply bringing property onto premises that could be moved at will. Rather, it involved placing the object "in a particular position with some idea of permanency".

[20] In applying the *Northern Broadcasting* test, Thompson J. held that the coolers were "land" within the meaning of s. 1(*k*)(iv) of the *Assessment Act*. The learned judge found that although the coolers could be moved, it was rarely done. If they were moved, it was to a location intended to be permanent. The coolers, which had removable attachments such as drainage and electricity outlets, had remained in their present location since being taken over by the applicant.

[21] An appeal to the Divisional Court was allowed on the basis that the learned trial judge had applied the wrong test (see: [1977] O.J. No. 1320, 2 M.P.L.R. 121 (Div. Ct.)). Steele J., on behalf of the court, stated that the test that should be applied was: "Are they heavy articles placed each in one particular spot with the idea of remaining there so long as they are used for the purpose for which they were placed upon the premises?" The decision was appealed to the Court of Appeal.

[22] In restoring the trial decision, the Court of Appeal stated that the trial judge had applied the proper test. Issues of weight and simplicity of assembly were relevant facts to consider in applying the test but did not become an element of the test as the Divisional Court purported to say.

[23] *Herbstreit v. Regional Assessment Commissioner, Assessment Region No. 15* (1982), 38 O.R. (2d) 642, [1982] O.J. No. 3465 (Co. Ct.), a decision of Shapiro J., involved facts very similar to the present case. At issue was whether a 200-foot boat, the Mark Twain Showboat, which was tied to the dock at the Port Credit Marina and had been used for a period of three years as a restaurant, was assessable pursuant to the Act, R.S.O. 1980, c. 31. The court considered the meaning of the word "structure" in the definition of "land" and "real property" as found in s. 1(*k*)(iv) of the

Act, as it then was, which is identical in wording to s. 1(*d*) of the Act currently under consideration.

[24] Relying on the decision in *Bedard*, *supra*, Shapiro J. held, on the facts of the case, that the Mark Twain was a structure as provided for within the meaning of s. 1(*k*) of the Act. In considering the tests in *Bedard* of intent, mobility and permanence, His Honour held, having regard to the Mark Twain's ten-year lease, the connections to land services, the fact that the Mark Twain's engines had been decommissioned and removed and that it had been continually used as a restaurant for the three years it had been at its dock, that the intent of the owners was to have the boat remain at its location as long as the restaurant was viable. Further, he considered that the boat had been immobile for the three years it had been there and was not being used as a ship for excursions on the lake. Finally, referring to the word "permanent" as "a relative term when applied to structures", the learned judge held that the test was the owner's intent as to mobility. In considering the issue of permanence, Shapiro J. referred to and distinguished Lord Denning's decision in *Cardiff Rating Authority*, *supra*. In reference to Denning L.J.'s statement that a ship, although constructed, was not a structure, the learned judge stated at p. 646 O.R.:

> Had the respected Law Lord said that a ship was not a structure when it was moored under the circumstances of the Mark Twain and used in the same manner as a land based restaurant, I would be more concerned as to the persuasiveness of his *dicta*. Since he did not say otherwise, I read Lord Denning's "ship" as referring to one moving about on water in the ordinary transport meaning of the word "ship". If this be so, his exclusion is easily understood, for just because it has size and is put together from various parts, that in itself does not make it a structure. A distinction must be drawn between the Mark Twain and say a vagabond ship which ties up briefly in various ports and then takes passengers on tours; or a moonlight cruise ship which makes short trips out of a home base. Incidental to such operations beverages and meals may be served. The test must be the owner's intent as to mobility.

[25] More recently, the question of whether a boat was a structure within the provisions of the *Assessment Act*, R.S.B.C. 1996, c. 20, was considered in the case of *Star of Fortune Gaming Management (BC) Ltd. v. British Columbia (Assessor of Area No. 10 — Burnaby/New Westminster)*, [2002] B.C.J. No. 1563, 114 A.C.W.S. (3d) 989 (S.C.). The boat in issue was operated as a riverboat casino and was berthed in New Westminster on the Fraser River. Although it was moored most of the time and connected to services on shore, it did disconnect and sail regularly for periods of about an hour each time. After reviewing the

authorities, including *Cardiff Ratings Authority*, *Bedard* and *Herbstreit*, C.L. Smith J. stated at para. 57:

> The weight of the authorities indicates that the word "structure" has connotations of permanency and difficulty of movement which would exclude operating marine vessels from its meaning in law. The courts have tended to take a narrower approach than the dictionary definitions might permit, because of the statutory contexts in which the word is used. Construing legislation (such as the *Assessment Act*) defining as assessable certain kinds of property which would be considered personality at common law, the courts have found that the word "structure" refers to things of substantial size, built or constructed with some permanence such that to remove them from where they are placed is likely to involve taking them apart (for example, in the judgments of Jenkins L.J. in Cardiff Ratings Authority and of Stratton J.A. in the *CIBC* case). In the *Herbstreit* case (upon which the respondent relied) the ship was disabled from movement and permanently moored, facts emphasized by Shapiro Co. Ct. J. in his decision.

[26] In holding that the vessel in question was not a "structure", the learned judge applied the test set forth by Lord Denning in *Cardiff Ratings Authority*, *supra*. Given that the vessel sailed regularly, the learned judge stated: "It is by no means something that has been installed with the intention of remaining permanently on a permanent foundation."

Analysis

[27] I agree with Mr. Justice Smith in *Star Fortune Gaming*, *supra*, that the weight of the judicial authorities, particularly in Canada, gives the word "structure" connotations of permanency and difficulty of movement. I also agree that, in defining the word wherever it appears, the courts have tended to apply a narrower definition than its dictionary definition. What must be remembered, however, in the context of the issue I am asked to decide, is that when considering the meaning within a taxing statute, the teleological or purposive approach must be applied.

[28] Having regard to the above-mentioned authorities and the context in which the word "structures" is used, not only in s. 1(*d*) of the definition of "land" and "real property" in the Act but s. 1(*e*) as well, it is my view that "structures" as referred to therein are an item or items (to use a neutral term) of substantial size which have been built or constructed and which are intended by the owner to remain permanently at their location. Intention is a question of reasonable inference to be drawn from all the evidence.

[29] The above definition is, in my view, in line with the purpose of the legislation and the provision in question. The general object and purpose of the Act is to tax all real property in Ontario. It does not tax personal property. By including "structures" in the definition of "real property", it is my view that the

legislature intended to include structures that are more akin to real property than personal property. Accordingly, to use the ordinary meaning of the word "structure" would be too broad. On the other hand, something large, of a permanent nature, is more akin to real property and should be included.

[30] In reaching the above conclusion, I do not agree with the applicant Corporation's submission that in order to be a "structure" within the meaning of the Act, the item must be "permanently on a permanent foundation" as Lord Denning stated in *Cardiff Rating, supra*. While such a situation would be a fact to be considered in determining whether the item in question was intended to remain permanently at its location, it does not conclusively determine the issue one way or another. Further, and as noted, Lord Denning's definition of structure in *Cardiff Rating* arose in the context of a statute that distinguished between "structures" and things "in the nature of structures". The context of the use of the word in the Act is much different.

[31] Subsection (*d*) of the definition "land" in the Act refers to ". . . all structures . . . erected or placed upon, in, over, under or affixed to land". Similar wording is used in [subsection] (*e*) but in relation to a highway, lane or other public communication or water. While I acknowledge that whether an item is a "structure" within the Act must be considered independently of whether and where the item is erected or placed, the fact that a structure can be upon, in, over and under land, a highway, lane, or other public communication or water indicates that the structure referred to in the section was not intended by the legislature to be restricted to just an item that has a permanent foundation.

[32] While the Supreme Court of Canada in *Springman*, *supra*, and *B.C. Forest Products*, *supra*, adopted Lord Denning's definition of structure in *Cardiff Rating, supra,* it was not in consideration of the meaning of the word within the Act. While the court's statements are to be considered, in my view, in interpreting the meaning of the word "structure" as it is used in the Act, they are not, in the circumstances, binding.

[33] Shapiro J.'s decision in *Herbstreit*, *supra*, was, in my view, correctly decided. In considering the meaning of the word "structures" in the Act, the learned judge was not prepared to adopt Lord Denning's definition of "structure" and, in my view, he was right. The applicant Corporation submits that Shapiro J. erred in not considering the full extent of Lord Denning's decision and the difference between "structures" and items "in the nature of a structure". The test as I have expressed it is really no different than the test used by Shapiro J. to conclude that the Mark Twain was a "structure" within the Act. He referred to the tests in

Bedard, supra, of "intent, mobility and permanence". Further on in his decision he stated that the test must be the owner's intent to mobility. All of these factors, in my view, go towards consideration of the whether the item is intended by the owner to remain permanently at its location.

[34] The decision in *Star of Fortune Gaming, supra*, can be distinguished by the fact that the vessel in issue in that case sailed regularly from its berth and was therefore not intended to remain at its berth on a permanent basis. As well, what was under consideration by the court in that case was the meaning of the word "structure" within the definition of "improvements" in the B.C. Act.

[35] Having regard therefore to the meaning of "structures" within the definition of "land" and "real property" in the Act, as I have found it, on the facts of this case, does the Jadran come within the definition? In my view, it does.

[36] It is conceded by the applicant Corporation that the first two *indicia* of a "structure" within the Act are met. The Jadran is an item of substantial size, which has been built or constructed.

[37] Is the Jadran intended by the owner to remain permanently at its location? In my view, it is clear from the evidence that it has been and continues to be the intention of the applicant Corporation to have the Jadran remain at its current location at 1 Queens Quay West permanently. It has been in its current location since November 1975, almost 32 years. From late 1976, it has been continuously operated as a restaurant, open to the public, and accessible by gangway from the shore. There is no evidence before me that the applicant Corporation intends to cease operating the Jadran as a restaurant at its current location.

[38] From the time of its arrival at its berthing location in 1975, the Jadran has been attached to the shore at its berthing location not only by the gangway but also by mooring lines and connections for water, electricity and sewage. It has not been used for the purposes of navigation. It has never left its berthing location to cruise or otherwise travel. Although it still has engines, they have not been operated since November 1975. It cannot leave its location to cruise or otherwise travel without assistance.

[39] Initially, the Jadran occupied its location by a long-term lease with the Toronto Harbour Commissioners. The lease was converted to a license agreement in December 1982, at the landlord's insistence because the Jadran's owners failed to meet their payments. Subsequently, the Port Authority became the owner of the lands.

[40] The license agreement provides, among other things, that for a monthly amount of $2,250, the Jadran can occupy a

berthing space of approximately 15,000 square feet of the Yonge Street slip in the waters of Lake Ontario that lie above the bed of Lake Ontario owned by the Port Authority. The license is month-to-month, terminable on 30 days' notice, in writing, or sooner depending on the happening of certain events.

[41] The applicant Corporation also sub-leased a portion of the dock wall and the adjacent strip of land from the owner (not the Port Authority), pursuant to a written sub-lease dated May 15, 1980. The term of the lease is one month, which is automatically renewed.

[42] While the terms of occupation are a factor to consider in determining the intention of the owner as to whether the "item" is to remain permanently in its location, they cannot be determinative. Notwithstanding that the license (and the sub-lease) is of short-term duration, it is clear, in my view, from the history of occupation and the length of those agreements that the relationship is long-term and will, in the absence of any unforeseen circumstances, remain so. In my view, the occupation agreements are consistent with the applicant Corporation's intention to have the Jadran remain at its current location for as long as it remains a restaurant, which is permanently.

[43] The applicant Corporation sought to distinguish *Herbstreit*, *supra*, on its facts, in respect of the issue of intention to remain in its present location permanently. It submitted that contrary to the Jadran, the Mark Twain had its engines decommissioned and removed. That fact was only one of many considered by the learned judge in deciding *Herbstreit* in the way in which he did. In my view, the facts of this case are, if anything, stronger than *Herbstreit* in relation to the issue of permanence. While the Jadran's engines have not been removed, the fact that they have not been operated for 32 years is not much different. In either case, new engines will be required (or, in the case of the Jadran, a total overhaul) for either ship to proceed anywhere under its own power. Further, the Mark Twain had only been at its location for three years without moving while the Jadran has been at its berthing slip for 32 years without moving.

[44] Accordingly, for the reasons stated, it is my view that the Jadran is a "structure" within the meaning of subsection (*d*) of the definition of "land" and "real property" in s. 1 of the Act. Further, and also in accordance with subsection (*d*), it is placed upon water, over land. Accordingly, the Jadran is "land" and "real property" within the meaning of the Act.

Does the Jadran occupy "real property" within the meaning of the Assessment Act?

[45] Section 3.1 of the Act provides that all real property in Ontario is liable to assessment and taxation subject to certain listed exemptions. Section 3.9 of the Act, which is one of the exemptions, provides that real property owned by, among others, a public commission is exempt from taxation so long as it is not "occupied by a tenant who would be taxable if the tenant owned the land". It is agreed by the parties that the Port Authority is considered to be a public commission within the Act. As noted at the outset, s. 1 of the Act defines "land" and "real property" to include land covered with water. A "tenant" is defined to include an occupant and the person in possession other than the owner.

[46] The applicant Corporation submits that the Jadran does not occupy the land owned by the Port Authority for two reasons. First, the Jadran sits only on surface water. As surface water does not encompass the land beneath it, the Jadran is not occupying the land. Second, having regard to the terms of the license agreement, the Jadran does not "occupy" the land of the Port Authority because the applicant Corporation, as licensee, does not have control or exclusive possession of the land. As a result, the land is exempt from taxation in accordance with s. 3.9 of the Act.

[47] Paragraph one of the license agreement provides a license to the Jadran to "occupy" berthing space in the waters of the (Port Authority's) Yonge Street Slip. Paragraph two provides that the area of the licensed space is more particularly described on Schedule "A". Schedule "A" describes, in words and by outline on a survey drawing, the licensed premises. The words begin as follows:

> ALL AND SINGULAR that certain parcel or tract of land, covered by water, situate, lying and being in the City of Toronto, in the Municipality of Metropolitan Toronto and in the Province of Ontario, being composed of a part of Block 18, according to a plan filed as E694 in the Registry Office for the Registry Division of Toronto (No. 63), containing by admeasurement 15,000 square feet. The boundaries of such parcel being described as follows: . . .

[48] It is clear from the license agreement itself that the lands licensed to the applicant Corporation are not just the surface waters but the land under the water, which is "land" pursuant to the definition in the Act.

[49] In support of its submission that the Jadran is not in possession of the land, the applicant Corporation relies on the British Columbia Court of Appeal decision of *RivTow Industries v. British Columbia (Assessment Commissioner)*, [1986] B.C.J. No. 31, 24 D.L.R. (4th) 475 (C.A.). The issue in that case was whether RivTow

was in possession of land owned by the Crown in circumstances where RivTow had been granted, through leases and licenses, the rights of use and occupation of surface waters covering the sea or river bed for log booming or storage. The court held that, because the demise was of the surface water and not the land beneath, RivTow did not have possession or occupy the land beneath.

[50] In my view, *RivTow, supra*, does not apply to the facts of this case. As noted, and unlike in *RivTow*, the grant here includes both the land and the water above. As the Jadran sits on the water surface and occupies almost the entire portion of the licensed premises, in my view, the Jadran, and hence the applicant Corporation, is in possession of the land.

[51] The applicant Corporation further submits that it does not occupy the land having regard to the terms of the license agreement. In *Stinson v. The Township of Middleton*, [1949] O.R. 237, [1949] O.J. No. 449 (C.A.), the Court of Appeal considered the issue of the meaning of "tenant" in the Act (as it then was). The definition of tenant being considered is identical to the current definition. At p. 247 O.R., Laidlaw J.A. stated:

> The word "occupant" in a wide sense means "one who occupies, resides in or is at the time in a place". But that word and the words "occupy", "occupier" and "occupation" appear in various statutes, and the question whether or not occupation in various circumstances amounts in law to occupation as a tenant has been the subject of many judicial opinions.

[52] Laidlaw J.A. then proceeded to review many of the judicial opinions and at the conclusion thereof, at p. 252 O.R., the learned judge set forth the following rules to guide the determination in the case before the court of whether a person was a "tenant" under the Act:

> (1) There is a substantial difference between the class of case where a person is permitted to occupy premises, and the class where a person is required to occupy them for the performance of his services or occupies them in order to their performance or because the occupation is conducive to that purpose. In cases of the latter class, apart from special circumstances, the occupation of the premises is considered in law to be the occupation of the master and not that of the servant.
>
> (2) The fact of payment of a sum in the nature of rent by a person entitled to the physical possession or use of premises, and whether the payment be by deduction from wages or otherwise, does not conclusively determine that such person is in possession of the premises as at tenant.
>
> (3) To be an "occupant" of premises, as that word is understood in law, a person must have control of them.
>
> (4) A privilege or mere licence to use premises does not necessarily include the right to exclusive possession of them, and such privilege or licence does not ordinarily confer on the grantee any estate or interest in them.

[53] The applicant Corporation submits that it is not an "occupant" because it does not have control of the licensed premises. It points to paras. 25 and 26 of the license agreement. Paragraph 25 provides that the applicant Corporation's operation and management of the business is subject to the supervision and/or inspection of the Port Authority; that the Port Authority has a right of entry for the purposes of supervision and/or inspection. These powers are qualified by the provision that the Port Authority is not authorized to interfere unreasonably with any lawful business conducted or to be conducted by the applicant Corporation or the lawful use or occupation of the premises by it. Paragraph 26 provides that the applicant Corporation must comply with all reasonable instructions, rules and regulations promulgated by the Port Authority in connection with the Port and Harbour of Toronto. It too contains the *proviso* that the Port Authority cannot interfere unreasonably with the applicant Corporation's lawful business conducted or to be conducted or its use or occupation of the premises.

[54] It is clear that the applicant Corporation is not a tenant in the common acceptance of that word. It is a licensee of the premises. Having regard to the provisions of the license agreement, however, it is my view that it is a "tenant" within the meaning of the Act. The applicant Corporation pays a monthly sum similar to rent to the Port Authority. Significantly, it has exclusive possession of the premises. As noted, the Jadran occupies almost the entire licensed premises. There is no way anyone or anything could occupy the property in addition to the Jadran. I am also of the view that the above-mentioned paragraphs in the license agreement do not remove exclusive control of the premises from the applicant Corporation. Those paragraphs give the Port Authority the right to interfere only in the event the applicant Corporation is not carrying on its business or occupying the premises in a lawful manner. They do not give control to the Port Authority.

[55] Accordingly, it is my view that having regard to the terms of the license agreement and the occupation of the premises by the Jadran, that the applicant Corporation is a "tenant" within the meaning of the Act and, therefore, the exemption in s. 3.9 of the Act does not apply.

[56] For the above reasons, therefore, the application will be dismissed.

[57] If the parties are unable to agree on costs, submissions in writing, including cost outlines, limited to five pages each, should be provided within 21 days.

Application dismissed.

1123B

COURT FILE NO.: 04/08
DATE: 20090318

SUPERIOR COURT OF JUSTICE - ONTARIO
(DIVISIONAL COURT)

RE: 1518756 ONTARIO INC. and TORONTO PORT AUTHORITY

Applicant

- and -

MUNICIPAL PROPERTY ASSESSMENT CORPORATION,
THE CITY OF TORONTO AND THE TORONTO PORT AUTHORITY

Respondents

BEFORE: CARNWATH, WILSON & KRUZICK JJ.

COUNSEL: *Jeff Cowan*, for the Applicant

Chester Gryski, for the Respondents

HEARD AT TORONTO: October 30, 2008

ENDORSEMENT

THE COURT:

Nature of the Proceeding

[1] The broad issue before us is whether Pattillo J. erred when he found that the appellant's ship, the Jadran, was a "structure" and the Toronto Port Authority lakebed on which it is located is "land", so that both could be assessed for taxation purposes.

Disposition

[2] We find the application judge made no error in fact or law. The appeal is dismissed.

Background

[3] The appellant corporation owns the Jadran, a former cruise ship berthed in Lake Ontario, in the City of Toronto. It operates as Captain John's, a floating restaurant and banquet facility.

The Toronto Port Authority owns the lakebed beneath the ship. The appellant has a licence agreement with the Port Authority for the occupation of the space.

[4] Both the land, consisting of the lakebed and the Jadran, were assessed by the respondent, the Municipal Property Assessment Corporation, for taxation purposes.

[5] Pursuant to the Port Authority licence, the Jadran occupies a berthing space of approximately 15,000 square feet of the Yonge Street slip owned by the Port Authority.

[6] The Jadran was assessed as a "structure" by the respondent at a value of $269,703, pursuant to s. 1(c) of the *Assessment Act*, R.S.O. 1990 c. A.31, as amended (the "*Act*"). The Port Authority's berthing space was assessed as "land" at a value of $774, 275.

[7] The questions raised by the Appellant on this appeal are whether the judge erred in finding that:

(1) The Jadran is a structure;

(2) The Jadran occupies land owned by the Port Authority; and,

(3) The appellant is in possession of that land.

Analysis

Standard of Review

[8] The standard of review is set out in *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 (S.C.C.), [2002] S.C.J. No. 31. In summary, on a pure question of law, an appellate court is free to replace the opinion of the trial judge with its own. Thus, the standard of review on a question of law is that of correctness. The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the motions judge made a "palpable and overriding error": *Stein v. Kathy K (The)*, [1976] 2 S.C.R. 802. Questions of mixed law and fact are subject to a more stringent standard of review applying a legal standard to a set of facts: *Canada (Director of Investigation and Research Competition) v. Southam Inc.*, [1997] 1 S.C.R. 748.

The Jadran is a Structure

[9] The appellant argues the Jadran is a ship or vessel and not a structure within the meaning of s. 1(e) of the *Act*. The appellant argues the case of *Herbstreit et al. v. Regional Assessment Commissioner, Assessment Region No. 15* (1982), 38 O.R. (2d) 642 (Co. Ct.), in which a floating restaurant was determined to be assessable as a structure placed on water, is either distinguishable from the case at bar or wrongly decided. In his review of this decision, the judge did not agree and we find no error in his analysis.

[10] "Structure" is defined in s. 1(e) of the *Act* as follows:

> 1. In this Act,
>
> . . .
>
> "land", "real property" and "real estate" include,
>
> . . .
>
> (e) all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water, but not the rolling stock of a transportation system; . . .

[11] The appellant argues that although the Jadran "is placed" upon water, it is not placed "permanently on a permanent foundation" as those words have been used in the jurisprudence.

[12] Pattillo J. determined that the Jadran was a structure within the definition of s. 1 of the *Act* since it was an item of substantial size that had been built or constructed and intended by the appellant to remain permanently in its location (paras. 36-37). He found that the Jadran need not be "permanently on a permanent foundation" in order to be a structure (paras. 26-31). Further, Pattillo J. found that the Jadran was placed on water over land, which was considered land under the *Act* (para. 44).

[13] In coming to his conclusions, the judge looked at the ordinary dictionary meaning of structure. He determined that it was "very broad", but that the courts have defined it more narrowly. We find Pattillo J. was correct to apply a teleological or purposive approach to determining the appropriate meaning of "structure" within a taxing statute (para. 27).

[14] The appellant argues that there was no legislative intent to expand the definition of structure to include a ship or a vessel, and referred us to *Star of Fortune Gaming Management (BC) Ltd. v. British Columbia (Assessor of Area No. 10 - Burnaby/New Westminster)*, [2002] B.C.J. No. 1563 (S.C.). Pattillo J. distinguished that case on its facts, finding that while the riverboat in that case was moored most of the time, it did disconnect and sail regularly. Similarly, the vessel in *S.S. Marina Ltd. v. North Vancouver (City)* (1974), 54 D.L.R. (3d) 13 (B.C.C.A.), which was solely used as a restaurant, was moved once a year to a shipyard for its annual overhaul, and the engines were still in place so that it could sail.

[15] Pattillo J. distinguished those cases on their facts. He found the reasoning in the case of *Herbstreit*, above, more appropriate to these facts. There, a floating restaurant was determined to be assessable as a structure placed on water. We do not accept the position of the appellant that the *Herbstreit* case is either distinguishable from the case at bar or wrongly decided. While the appellant argues that the Supreme Court of Canada jurisprudence as to the meaning of the term "structure" supports the appellant's position, we disagree. We find that Pattillo J. was correct in his analysis of the decisions going back to *Cardiff Rating Authority v. Guest Keen*

Limited, [1949] 1 All E.R. 27 (C.A.), as it was referred to in two separate Supreme Court of Canada decisions: *R. v. Springman*, [1964] S.C.R. 267 and *British Columbia Forest Products Ltd. v. Canada (Minister of National Revenue-MNR)*, [1972] S.C.R. 101.

[16] We agree with the respondent that the Jadran has been located within its current premises, tied to the adjoining dock and connected to public utilities since 1977. The appellant had the intention that it remain on the current premises permanently. The case law upon which the appellant relies was correctly distinguished by Pattillo J.

[17] Pattillo J. was correct in finding that the Jadran was a structure within the meaning of s. 1(e) of the *Act*.

The Jadran Occupies Land Owned by the Port Authority

[18] The appellant submits that the Jadran occupies a berthing space in the water *above* the land owned by the Port Authority and, therefore, does not occupy the land itself.

[19] Section 3.1(9) of the *Act* provides, as follows:

> **3.1** All real property in Ontario is liable to assessment and taxation, subject to the following exemptions from taxation:
>
> . . .
>
> **9.** Subject to section 27, land owned by a municipality, including an upper-tier municipality, a public commission or a local board as defined in the *Municipal Affairs Act*. The land is not exempt if occupied by a tenant who would be taxable if the tenant owned the land, except land owned by a harbour commission and used for parking vehicles for which a fee is charged.

[20] The appellant submits that it does not occupy the land owned by the Port Authority for two reasons: first, it sits on water; and second, as a licensee, it does not control or have exclusive possession of the land. As a result, it is argued the land is exempt from taxation, pursuant to the above s. 3.1(9) of the *Act*.

[21] We find that the judge on the application correctly referred to the licence agreement itself, which did not just include the surface water, but the land under the water, which is "land" pursuant to the definition in the *Act*.

[22] Pattillo J. was correct in finding the Jadran occupied land owned by the Port Authority.

The Appellant is in Possession of the Land

[23] The appellant argued it was not in possession of the land. In support of its position, the appellant relied on the decision of *RivTow Industries v. British Columbia (Assessment Commissioner)* (B.C.C.A.), [1986] B.C.J. No. 31. We agree with the finding of the judge that the *RivTow* case does not apply to the facts in this case. In *RivTow*, the lease was for the surface of the water. In the case before us, and as found by the application judge, "the Jadran sits on the water surface and occupies almost the entire portion of the licensed premises ... hence the applicant Corporation, is in possession of the land" (para. 50).

[24] We were referred to the licence agreement, specifically to paragraphs 25 and 26, for the proposition that the Jadran does not occupy the land because it does not have control of the licenced premises. As was found by the judge on the application, we disagree and find that the Port Authority's rights are very limited. In the end, as found by the judge, "the Port Authority cannot interfere unreasonably with the applicant Corporation's lawful business conducted or to be conducted or its use or occupation of the premises" (para. 53).

[25] The judge found that pursuant to the licence agreement, this was not a tenancy in the usual sense, but he did find the appellant was a tenant within the meaning of the *Act*. We agree with the findings of the judge that the licence agreement does not remove exclusive control of the premises by the Jadran. The agreement gives limited right to interfere only in the event of the appellant not carrying on its business or occupying the premises in a lawful manner. We agree with Pattillo J.'s conclusion that the licence agreement does not give control of the land to the Port Authority. Rather, Jadran's occupation of the land under the surface of the water essentially excluded the Port Authority from interference except in the limited right to do so should the appellant carry on business in an unlawful manner. We agree with Pattillo J.'s finding that the licence agreement does not give control to the Port Authority and that the exemption relied upon by the appellant does not apply.

[26] Pattillo J. was correct in concluding the applicant is in possession of the land (the lakebed) under the Jadran.

[27] We conclude the application judge made no error in fact or law. The appeal is dismissed.

[28] The appellant submits costs should be fixed in the amount of $2,500, while the respondent asks for $7,500. There shall be costs to the respondent fixed in the amount of $7,500, inclusive of fees, disbursements and GST, on a partial indemnity basis, payable in thirty days.

CARNWATH J.

WILSON J.

KRUZICK J.

DATE: March 18, 2009

TAB 5

1048A

vehicles and not punishing those who exercise due diligence with respect to children's seat belts. The minor penalty points towards absolute liability. Finally, the wording of s. 106(6) of the *HTA* suggests that it established a strict liability offence.

E. *Disposition*

[45] I would dismiss the appeal.

Appeal dismissed.

Carsons' Camp Ltd. v. Municipal Property Assessment Corp. et al.

[Indexed as: Carsons' Camp Ltd. v. Municipal Property Assessment Corp.]

Court of Appeal for Ontario, Simmons, MacFarland and Rouleau JJ.A.
January 14, 2008

Assessment — Constitutionality — Trailers owned by third parties which were placed on campground owner's land with sufficient permanency to be considered part of land being included in owner's property tax assessment — Assessment of trailers not amounting to indirect tax — Taxation of trailers being authorized by statute and not contravening s. 53 of Constitution Act, 1867 — Assessment Act, R.S.O. 1990, c. A.31 — Constitution Act, 1867, s. 53.

Assessment — Interpretation — "Current value" — Inclusion of term "fee simple" in definition of "current value" not having effect of limiting tax assessment to interests owned by owner of the underlying land — Section 19(1) of Assessment Act contemplating assessment of all that falls within expanded definition of "land" — Trailers owned by third parties which were placed on campground owner's land with sufficient permanency to be considered part of land being properly included in owner's property tax assessment — Assessment Act, R.S.O. 1990, c. A.31, ss. 1, 19(1).

The applicant owned and operated a campground which contained campsites that were rented out to third party trailer owners on a seasonal basis. The respondent determined that a number of the third-party-owned trailers were placed on the applicant's property with sufficient permanency to be considered part of the applicant's land for the purpose of assessment under the *Assessment Act*. The applicant applied for an order declaring that seasonally-used trailers owned by third parties could not be assessed and taxed as land under the Act, that taxation of such trailers amounted to an indirect tax and was beyond the legislative competence of the province, and that taxation of such trailers was not authorized by statute and contravened s. 53 of the *Constitution Act, 1867*. The application was granted in part. The application judge found that the trailers did not form part of the "current value" of the land. "Current value" is defined in s. 1 of the Act as meaning "in relation to land, the amount of money the fee simple, if

unencumbered, would realize if sold at arms length by a willing seller to a willing buyer". The application judge found thatt he trailers could not be assessed and taxed as land because they did not form part of the "fee simple" of the applicant's property. He rejected the applicant's constitutional challenges. The respondent appealed and the applicant cross-appealed.

Held, the appeal should be allowed; the cross-appeal should be dismissed.

The application judge erred in his interpretation of the term "current value". The inclusion of the term "fee simple" in the definition of "current value" did not have the effect of limiting tax assessment to interests owned by the owner of the underlying land. If the legislature had intended it to have that effect, it would have changed the definition of land in the Act to make it coincide with the common law definition of land. The failure to do so was not merely an oversight. The definition of "current value" in s. 1 must be read harmoniously in the context of the whole of the Act, the object of which is to assess all property in Ontario coming within the expanded definition of "land", "real property" and "real estate". Similarly, the term "fee simple" cannot be isolated from the rest of the definition of "current value". That definition clearly states that it is to be applied "in relation to land". The expression "fee simple" was not intended to limit assessment to the "fee simple" interest in the freehold owner at common law. Rather, the words "fee simple" must be interpreted "in relation to" the statutorily broadened definition of "land". The Act contemplates identifying what is land according to the expanded definition, then assessing the value of the land assuming a fee simple ownership interest without encumbrance of all that comes within the definition. The trailers were properly included in the applicant's property tax assessment.

The assessment of the trailers did not amount to an indirect tax. The tax had the hallmarks of a true land tax. It was imposed on land and assessed as a percentage of the value of land. It was collected from the owner of the freehold. The fact that the tax may be recouped from a third party did not change the nature of the tax and make it indirect. The fact that the definition of land in the Act includes items not owned by the owner of the freehold did not change the character of the tax.

The tax did not contravene s. 53 of the *Constitution Act, 1867*. The Act authorizes the levy of realty taxes against the owner of the freehold for the assessed value of land as broadly defined in the statute. Once a trailer comes within the definition of land, it is included in the assessed value without regard to the ownership of the trailer. The Act provided the statutory basis for the tax on land, defined to include the trailers. The tax was authorized by statute, and the statutory authorization predated the *Taxpayer Protection Act, 1999*, S.O. 1999, c. 7.

Cases referred to

Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 93 C.R.R. (2d) 189, 18 C.P.R. (4th) 289, 2002 SCC 42; *McMaster University and City of Hamilton (Re)* (1975), 16 N.R. 589 (S.C.C.), affg (1973), 1 O.R. (2d) 378, [1973] O.J. No. 2179, 16 N.R. 590 (C.A.); *Myers v. Ontario Regional Assessment Commissioner, Region No. 32* (1991), 3 O.R. (3d) 488, [1991] O.J. No. 910, 81 D.L.R. (4th) 149, 4 M.P.L.R. (2d) 238 (Div. Ct.); *Northern Broadcasting Co. v. Mountjoy (Improvement District)*, [1950] S.C.R. 502, [1950] S.C.J. No. 19, [1950] 3 D.L.R. 721; *Ontario Home Builders' Assn. v. York Region Board of Education*, [1996] 2 S.C.R. 929, [1996] S.C.J. No. 80, 29 O.R. (3d) 320*n*, 137 D.L.R. (4th) 449, 201 N.R. 81, 35 M.P.L.R. (2d) 1, 4 R.P.R. (3d) 1

Statutes referred to

Assessment Act, R.S.O. 1990, c. A.31, ss. 1 "land", "real property" and "real estate", "current value", 3(1) [as am.], 17(1) [as am.], 19(1) [as am.]
Constitution Act, 1867, ss. 53, 92(2)
Taxpayer Protection Act, 1999, S.O. 1999, c. 7, Sch. A

APPEAL AND CROSS-APPEAL from the judgment of O'Connell J., [2006] O.J. No. 5373, 49 R.P.R. (4th) 288 (S.C.J.), allowing in part an application attacking an assessment.

Christian G. Schulze, for appellant, respondent by cross-appeal, Municipal Property Assessment Corporation.
Donald R. Greenfield, for appellant, respondent by cross-appeal, the Corporation of the Town of South Bruce Peninsula.
John L. O'Kane, for intervenors for County of Bruce, County of Prince Edward, County of Huron, County of Lambton, County of Brant, County of Simcoe, County of Grey, United Counties of Prescott-Russell, City of Sarnia, City of Quinte West, City of Elliot Lake, Municipality of East Hawkesbury, Township of Ear Falls, Township of Tay, Town of Goderich and Town of Espanola and Town of Lincoln.
Peter T. Fallis, for respondent, appellant by cross-appeal, Carsons' Camp Limited.
Shannon M. Chace-Hall, for intervenor the Attorney General of Ontario.

The judgment of the court was delivered by

[1] ROULEAU J.A.: — This appeal concerns the proper interpretation of "current value" as it appears in s. 19(1) of the *Assessment Act*, R.S.O. 1990, c. A.31 (the "Act"). The issue is whether the assessed value upon which the owner of the underlying land must pay taxes can properly include the value of third-party owned trailers which are placed upon or affixed to the land.

I. *Background*

[2] Carsons' Camp Limited owns and operates a 53 acre campground on the shores of Lake Huron in the Town of South Bruce Peninsula. In addition to 205 campsites for transient campers, the campground contains 495 campsites that are rented out to individual third party trailer owners on a seasonal basis from May 1 to October 15 of each year.

[3] The Municipal Property Assessment Corporation ("MPAC") determined that 229 of the third-party owned trailers located on Carsons' property were placed there with sufficient permanency

to be considered part of Carsons' land for the purpose of assessment under the Act. MPAC issued an Omitted Property Assessment Notice for the 2003 taxation year which included the value of the 229 trailers, thereby adding $5,250,000 to Carsons' pre-existing assessment for that year.

[4] The 2003 Omitted Assessment was subsequently cancelled by regulation. However, for the 2004 and 2005 taxation years MPAC assessed all seasonally-used trailers it determined to be land within the meaning of the Act to the owners of campgrounds across Ontario. Carsons' assessment again included $5,250,000 on account of the value of the 229 trailers.

[5] Carsons' does not dispute that the 229 trailers met MPAC's criteria for determining whether a trailer should be assessed under the Act. In order to meet MPAC's "permanency test", a trailer unit must be at least 102 inches (8' 6") wide, with or without an addition. The trailer unit must also meet three of the following five criteria:

(1) The trailer unit has permanent water, electrical and waste disposal connections to the site;

(2) The trailer unit requires an oversize permit for road travel (based on its width, length, height or weight);

(3) The trailer unit is equipped with attached structures such as a deck, carport, garage or sunroom;

(4) The trailer unit's tow tongue has been removed; and

(5) The trailer unit is placed on concrete blocks or a concrete pad or other foundation, whether or not the undercarriage has been removed.

[6] Despite conceding permanency, Carsons' argued that the value of the trailers should nonetheless not be included in its property tax assessment by virtue of a 1997 amendment to the Act which changed the basis for valuation from "market value" to "current value". The significance of this change will be discussed in detail below.

[7] In February 2005, Carsons' applied for an order declaring, among other things, that:

(1) seasonally-used trailers owned by third parties cannot be assessed and taxed as land under the Act;

(2) taxation of seasonally-used trailers owned by third parties amounts to an indirect tax and is beyond the legislative competence of the province; and

(3) taxation of seasonally-used trailers owned by third parties is not authorized by statute and contravenes s. 53 of the *Constitution Act, 1867*.

[8] The application judge allowed Carsons' application in part. He held that seasonally-used trailers owned by third parties and not intended to be permanent fixtures on the land do not form part of the "current value" of land as that term is defined in the Act. He therefore concluded that the 229 trailers in question could not be assessed and should not have been included in Carsons' property tax assessment. The application judge rejected Carsons' constitutional challenges to the taxation scheme.

[9] MPAC and the Town of South Bruce Peninsula appealed on the question of whether seasonally-used trailers owned by third parties can be assessed and taxed as land under the Act. Carsons' cross-appealed on the question of whether taxation of seasonally-used trailers owned by third parties violates ss. 53 and 92(2) of the *Constitution Act*. The Attorney General of Ontario and a coalition of 17 municipalities intervened in support of MPAC and the Town's positions on the appeals.

[10] I am of the view that the application judge erred in his interpretation of the term "current value"; I would therefore allow the appeal. I agree with the application judge's conclusions on the constitutional issues and would dismiss the cross-appeal.

II. *The Statutory Scheme Under the Act*

(a) *All land is liable to assessment*

[11] Section 3(1) of the Act provides that "all real property in Ontario is liable to assessment and taxation" subject to certain exceptions (none of which apply in this case).

[12] The terms "real property", "land" and "real estate" are used interchangeably throughout the Act and are broadly defined in s. 1 to include:

> (*a*) land covered with water,
>
> (*b*) all trees and underwood growing upon land,
>
> (*c*) all mines, minerals, gas, oil, salt quarries and fossils in and under land,
>
> (*d*) *all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land,*
>
> (*e*) all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water, but not the rolling stock of a transportation system.

(Emphasis added)

[13] This broad definition has not changed since its introduction in the Act in 1904 and its interpretation continues to be governed by the Supreme Court of Canada's decision in *Northern Broadcasting Co. v. Mountjoy (Improvement District)*, [1950] S.C.R. 502, [1950] S.C.J. No. 19. In that case, the majority held that the expanded definition of land in the Act meant that certain items not considered fixtures at common law could nonetheless be considered part of the land for the purpose of valuation, so long as they are placed upon or affixed to land with some degree of permanency.

(b) *Land is assessed against the owner*

[14] Section 17(1) of the Act states that "land shall be assessed against the owner". The term "owner" is not defined in the statute, but has been interpreted to mean the legal owner of the land: see *McMaster University and City of Hamilton (Re)* (1973), 1 O.R. (2d) 378, [1973] O.J. No. 2179 (C.A.), at p. 383 O.R., affd (1975), 16 N.R. 589 (S.C.C.).

[15] Where the land is comprised of interests owned by tenants or third parties other than the owner of the underlying land, the Act does not provide for separate assessment of each individual owner: *Myers v. Ontario Regional Assessment Commissioner, Region No. 32* (1991), 3 O.R. (3d) 488, [1991] O.J. No. 910 (Div. Ct.), at p. 491 O.R. In *Myers*, the court held that trailers, which were occupied year round in that case, were assessable against the owner of the land upon which they were placed or to which they were affixed, notwithstanding the trailers being owned by third parties.

(c) *Assessment of land is based on current value*

[16] Section 19(1) of the Act provides that "[t]he assessment of land shall be based on its current value". "Current value" is defined in s. 1:

> "current value" means, in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer;

[17] The term "current value" first appeared in the Act in 1997. Prior to that, the statute provided that land was to be assessed at its "market value", which was defined as "the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer".

[18] This change in wording to include the term "fee simple" in the definition of "current value" is at the centre of this case. The parties disagree as to whether the introduction of the term "fee

simple" has the effect of limiting tax assessment to interests owned by the owner of the underlying land.

III. *The Judgment Below*

[19] The application judge appears to have accepted that the 229 trailers in issue were placed on Carsons' land with sufficient permanency so as to constitute land within the expanded definition in s. 1 of the Act. Following *Myers*, he also accepted that the entire value of a parcel of land is to be included in a single assessment against the owner of the underlying land, and that the Act does not provide for a separate assessment being produced for each trailer distinct from the land upon which it is placed or to which it is affixed.

[20] Nevertheless, the application judge concluded that the 229 trailers could not be assessed and taxed as land because they did not form part of the "fee simple" of Carsons' property. He wrote at paras. 61-62:

> I ask the question how can the meaning of current value, the basis for the assessment include the value of 229 trailers, if they are land. They are not part of [the] [f]ee [s]imple. They would not be sold by a willing seller to a willing buyer nor would they be part of a sale of land, as they are not owned by the seller.
>
> The term "fee simple" does not cover moveable trailers owned by third parties. Such being the case, they must be classified as chattels, moveable, unless the interpretation of the word land, referring to structures *i.e.* trailers, is extended to include such, they being placed there with some degree of permanency. If such is the interpretation [then] the definition of current value for the purposes of the *Assessment Act* is deficient.

[21] Unable to reconcile the definition of "land" and the definition of "current value" with respect to seasonally-used trailers, the application judge concluded at para. 70 that the 229 trailers could not be assessed "until such time as appropriate amendment is made" to the definition of current value in the Act.

IV. *Analysis*

The main appeal

(a) *Appellants' submissions*

[22] The appellants submit that the application judge misconstrued the words and purpose of s. 19(1) in concluding that the definition of "current value" is at odds with the definition of "land". The definition of land has not changed since 1904 and the value of land for assessment purposes has been based

on this expanded definition ever since. In the appellants' view, the application judge's interpretation of "current value" divorces the valuation function from the statutory definition of land. Further, it fails to take into account the purpose of the Act as a whole.

[23] The appellants submit that use of the term "fee simple" in the definition of "current value" is intended to capture the totality of interests in an assessable parcel of land; the term does not preclude parts of the land assessed from being owned by individuals other than the freehold owner. The appellants submit that neither the language nor purpose of this amendment indicates an intention to alter the law that everything encompassed by the defined term "land" is to be included in assessing value. It would be illogical, they contend, to define land broadly in one part of the Act, only to ignore this definition when determining the assessed value of land in another part.

(b) *Respondent's submissions*

[24] In contrast, Carsons' argues that by introducing the concept of "current value" as that term is defined, the legislature intended to exclude from the assessed value of land anything that would not have been considered land at common law. This is why the legislature used the term "fee simple" in the definition of "current value". Carsons' submits that the failure to change the definition of "land" to coincide with this more limited interpretation should simply be viewed as an oversight.

[25] Carsons' further notes that the legislature discontinued the separate assessment of tenants for business occupancy taxes as part of the 1997 amendments. Since then, only the owner of the freehold of the land receives an assessment; tenants no longer receive a separate assessment for the portion of land they occupy. This change, Carsons' argues, supports their submission that by its 1997 amendments the legislature intended to exclude from the assessed value of the land property, such as the 229 trailers, that are owned by third party tenants.

(c) *Discussion*

[26] I agree with the appellants' submissions that nothing on the record before us suggests that the legislature intended to change what is to be included in the assessed value of land. If Carsons' interpretation is accepted, it would signal a dramatic change in the scope of the Act as it has existed and been applied since 1904 and render the expanded statutory definition of land

meaningless. If the legislature had intended to do so, it would have changed the definition of land in the Act to make it coincide with the common law definition of land. The legislature did not, and I do not find Carsons' submission that this failure was merely an "oversight" to be persuasive.

[27] In addition, I am not persuaded that the change in 1997 from occupancy-based business taxes assessed as against each individual tenant to realty taxes payable by the freehold owner is relevant to the present discussion. Business occupancy taxes were in no way concerned with ownership of the property or the assessed value of the land as a whole; neither is there evidence to indicate that Carsons' tenants were carrying on businesses from their trailers. I do not accept that discontinuance of separate business tax assessments signals an intention to change what was to be included in the assessed value of land.

[28] The interpretation advanced by the appellants accords with the modern approach to statutory interpretation. The Supreme Court of Canada in *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26, quoted with approval Professor Driedger's formulation of the modern approach to statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[29] In my view, the change from "market value" to "current value" and the reference to "fee simple" in the definition of "current value" were not intended to change what is to be included in the assessed value. The definition of "current value" in s. 1 must be read harmoniously in the context of the whole of the Act, the object of which is to assess all property in Ontario coming within the expanded definition of "land", "real property" and "real estate". Similarly, the term "fee simple" cannot be isolated from the rest of the definition of "current value". That definition clearly states that it is to be applied "in relation to land". From this contextual perspective, it is apparent that the expression "fee simple" was not intended to limit assessment to the "fee simple" interest of the freehold owner at common law or as that interest would appear in the registry or land titles offices. Rather, the words "fee simple" must be interpreted "in relation to" the statutorily broadened definition of "land".

[30] Put another way, the Act contemplates identifying what is land according to the expanded definition, then assessing the

value of the land assuming a fee simple ownership interest without encumbrance of all that comes within the definition. There are strong policy reasons for interpreting the Act in this way. The dominant owner of the freehold is easily identified; there is no need to determine the ownership interest in each portion of the broadly defined "land". This approach makes it easier to assess the total value of the land, while also preventing manipulation of assessed value by changing the ownership of parts of the land. Further, the freehold owner controls what is included in the assessed value because the freehold owner controls what is placed on the land and on what terms.

[31] For these reasons, I conclude that s. 19(1) of the Act contemplates assessment of all that falls within the expanded definition of land despite the use of the words "fee simple". The 229 trailers were therefore properly included in Carsons' property tax assessment.

The cross-appeal

[32] It is Carsons' position that the application judge ought to have found that the assessment of the 229 trailers is an indirect tax and is therefore beyond the legislative competence of the province. Further, Carsons' submits that the assessment and taxation of the 229 trailers is not authorized by statute and therefore contravenes s. 53 of the *Constitution Act*. I disagree.

(a) *Is the tax direct or indirect?*

[33] Carsons' relies on *Ontario Home Builders' Assn. v. York Region Board of Education*, [1996] 2 S.C.R. 929, [1996] S.C.J. No. 80 to argue that the tax on the 229 trailers is indirect and beyond the legislative competence of the province. Carsons' points out that the portion of its realty taxes attributable to the value of the trailers is not levied against the owners of the trailers. Rather, it is demanded from one person (Carsons') with the intent and expectation that someone else (the owners of the trailers) will pay. The character of the tax is therefore indirect.

[34] I would not give effect to this submission. As Iacobucci J. explained in *Ontario Home Builders' Assn.* at para. 46:

> [T]he incidence of land tax, in the traditional sense, will be direct. *The hallmarks of a land tax are that the tax is, of course, imposed on land against the owner of the land, and that the tax is assessed as a percentage of the value of the land,* or as a fixed charge per acre. The tax may be an annual, recurring assessment, or a one-time charge. . . . *Although landowners, like everyone, may wish to pass on their tax burden to someone else*

or otherwise avoid taxation, this desire or ability does not transform the direct nature of the tax into an indirect one. . . .

(Emphasis added)

[35] The tax in issue has the hallmarks of a true land tax. The tax is imposed on land and assessed as a percentage of the value of land. The tax is collected from the owner of the freehold, who is also the very person whom the legislature intends and desires should pay it. The fact that the tax may be recouped from a third party does not change the nature of the tax and make it indirect; on the contrary, landlords almost always recoup realty taxes from tenants in some manner.

[36] The fact that the definition of land in the Act includes items not owned by the owner of the freehold also does not change the character of the tax. When determining the incidence of a tax, it is important to bear in mind the context within which the tax operates as well as the purpose of the tax: *Ontario Home Builders' Assn.*, at para. 43. Here, the 229 trailers have features closely associated with the land and are structures placed thereon with a degree of permanency. The purpose of the assessment is the taxation of land and the tax is therefore a direct tax within the competence of the province.

(b) *Does the tax contravene section 53 of the Constitution Act, 1867?*

[37] Carsons' argues that the 1997 amendments to the Act restrict assessment to the freehold interest in the land, including chattels affixed to the land in which the owner of the freehold has a fee simple interest. Carsons' submits that, absent an amendment to the Act, the province cannot now assess and tax the 229 trailers because they do not constitute fixtures at common law and the owner of the freehold does not have a fee simple interest in the trailers. This argument is closely linked to Carsons' position in the main appeal.

[38] Carsons' position is that, before the province can levy a tax on these trailers, s. 53 of the *Constitution Act* requires that the province pass a bill in the legislature authorizing such tax. Since the adoption of the *Taxpayer Protection Act, 1999*, S.O. 1999, c. 7, Sch. A, a referendum is required before such a new tax is imposed.

[39] I would not give effect to this submission. As set out earlier in these reasons, I interpret the Act as authorizing the levy of realty taxes against the owner of the freehold for the assessed value of land as broadly defined in the statute. Once a trailer comes within the definition of land, it is included in the

assessed value without regard to the ownership of the trailer. Both prior to and following the 1997 amendments, the Act provides the statutory basis for the tax on land, defined to include the 229 trailers. The tax on these trailers is authorized by statute and this statutory authorization pre-dates the *Taxpayer Protection Act*.

V. *Conclusion*

[40] I would allow the appeal and would grant an order deleting paras. 1 to 6 from the judgment and dismissing the claim for relief granted therein and amending para. 12 as required to give effect to these reasons. I would also dismiss the cross-appeal and award costs to the appellants fixed at $30,000, inclusive of disbursements and GST.

Appeal allowed; cross-appeal dismissed.

Her Majesty the Queen v. Colson

[Indexed as: R. v. Colson]

Court of Appeal for Ontario, Simmons, Blair JJ.A. and McKinnon J. (ad hoc) January 15, 2008

Criminal law — Search and seizure — Consent — Standard of proof required at common law to prove consent to provide DNA sample — Accused arguing that Crown should be required to prove beyond a reasonable doubt that consent was voluntary — Trial judge did not err in applying standard of balance of probabilities to Crown's proof of accused's consent to provide DNA sample.

The accused was charged with first degree murder. He was convicted largely on the basis of a DNA match between semen found on the victim and a saliva sample that he had previously given to the police as part of a post-release supervision program for violent offenders. Applying a balance of probabilities test, the trial judge found that the saliva sample was obtained with the accused's voluntary and informed consent. On appeal from his conviction, the accused argued that the trial judge failed to apply the appropriate standard of proof at common law in determining whether a voluntary and informed consent was given. He submitted that the Crown was required to demonstrate beyond a reasonable doubt that there was a proper common law waiver of rights with respect to the giving of the bodily sample, just as it must do under the common law confessions rule, because a body sample and a statement are both conscriptive forms of evidence that, if admitted when illegally obtained, tend to undermine the overarching principles of trial fairness and the right to protection against self-incrimination.

Held, the appeal should be dismissed.

TAB 6

MAY 16TH, 1932.

RE MARLEY & SANDWICH.

Assessment and Taxes—Billboards—Fixtures—Assessability—Who assessable—Business tax.

Appeal by C. E. Marley, Ltd., by way of case stated by the County Judge of the County of Essex upon an assessment appeal.

The appeal was heard by **Latchford, C.J., Orde,** and **Fisher, JJA.**

A. J. Gordon for the appellant.

John Sale, K.C., for the Town of Sandwich, respondent.

This case was stated for the opinion of the Court under s. 84 of the Assessment Act, R.S.O. 1927, c. 238. The point in question was whether advertising billboards erected on vacant lands under a lease allowing for the removal of the boards at the termination thereof were properly assessable as buildings, which they were held to be by the County Judge under s. 1 (h) (4) of the Assessment Act, and if so whether assessable against tenant or owner or both, also whether the tenant was assessable to business tax in respect thereof.

Orde, J.A., delivering the judgment of the Court, held the County Judge right in classing the billboards as fixtures. Neither the fact that they remained the property of the tenant nor the fact that they did not add to the selling value of the land, could alter their character. These structures being part of the land, must be assessed under the Act, which did not provide for assessment of leasehold interests. The appellant might be a licensee rather than lessee. But under s. 1(n) tenant includes occupant, and that the appellant was. The appellant was using and occupying land for the purposes of its business within s. 9 (1) of the Act, and therefore the County Judge was right in holding the appellant assessable for business.

Respondents counsel raised the question as to whether the appellant had been placed in the proper business category. But that question was not before the Court and ought not to be decided.

The appeal must be dismissed with costs.

Appeal dismissed.

TAB 7

THE NEW SHORTER OXFORD ENGLISH DICTIONARY

ON HISTORICAL PRINCIPLES

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LESLEY BROWN

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transmission /tranz'miʃ(ə)n, tra:nz-, -ns-/ *n.* E17. [L *transmissio*(*n*- f. as TRANS- + *missio*(*n*-: see MISSION *n.*] 1 Conveyance or transfer from one person or place to another; the action or process of passing from one person, organism, generation, etc., to another, as by personal contact, stored information, genetic inheritance, etc. E17. 2 Conveyance or passage through a medium, as of light, heat, sound, etc. Also *spec.*, the sending out of electrical signals or electromagnetic waves; the broadcasting of radio or television programmes; an instance of this, a series of transmitted signals, a broadcast. E18. 3 *Mech.* Transfer of motive force from one place to another; a device for effecting this; *spec.* (in full *transmission-gear*) a mechanism for transmitting the power of an engine etc., esp. to the axle of a motor vehicle. E20.

1 DE QUINCEY One link in the transmission of the Homeric poems. *Independent* The most common mode of transmission was heterosexual intercourse. 2 C. G. BURGE The number of channels available for radio transmission is limited. *Financial Times* The poor quality of the connection makes most data transmission impossible.

Comb.: **transmission electron microscope** a form of electron microscope in which an image is derived from electrons which have passed through the specimen; *spec.* one in which the whole image is formed at once, not by scanning; *transmission-gear*: see sense 3 above; **transmission line** a conductor or set of conductors designed to carry electricity (esp. on a large scale) or electromagnetic waves with minimum loss and distortion; **transmission loss** dissipation of electrical or acoustic power during its passage from one point to another.

transmissional *a.* M20.

transportation /transpɔːˈteɪʃ(ə)n, tranz-/ *n.* M16. [f. TRANSPORT *v.* + -ATION.] **1** The action or process of transporting something; conveyance of people, goods, etc., from one place to another; *spec.* (*Hist.*) the action or system of transporting convicts to a penal colony. M16. **b** *Geol.* The movement of particulate or dissolved material by water, ice, wind, etc. M19. †**2** = TRANSPORT *n.* 2. Only in 17. **3** = TRANSPORT *n.* 3. *N. Amer.* M19. **b** A ticket or pass for travelling by public transport. *US.* E20.

1 L. STRACHEY This sentence . . was commuted for one of transportation for life. *Sun* (*Baltimore*) Roads will face competition from other modes of transportation. 3 S. BELLOW I hope you don't take public transportation to work.

transportational *a.* of or pertaining to transportation L19. **transportationist** *n.* (*Hist.*) an advocate of the transportation of convicts M19.

TAB 8

SULLIVAN
ON THE
CONSTRUCTION OF STATUTES

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Ruth Sullivan

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(2) presumed competence; (3) the presumption against tautology; (4) the presumption of consistent expression. Part 2 illustrates how these presumptions are used in textual analysis, including the standard Latin maxims *noscitur a sociis* (associated words), *ejusdem generis* (limited class) and *expressio unius est exclusio alterius* (implied exclusion). The chapter ends with a note on collocation.

PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED

PRESUMED KNOWLEDGE AND COMPETENCE

§8.9 ***Presumed knowledge.*** The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts[8] and with mastery of existing law, common law and the *Civil Code of Québec* as well as ordinary statute law, and the case law interpreting statutes.[9] The legislature is also presumed to have knowledge of practical affairs.[10] It understands commercial practices and the functioning of public institutions, for example, and is familiar with the problems its legislation is meant to address. In short, the legislature is presumed to know whatever facts are relevant to the conception and operation of its legislation.[11]

§8.10 The presumption of knowledge is not often discussed by the courts but is implicit in the interpretive rules and techniques on which they rely. For exam-

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8 In *Willick v. Willick*, [1994] S.C.J. No. 94, [1994] 3 S.C.R. 670 (S.C.C.), L'Heureux-Dubé J. wrote, at 699: "An integral aspect of discovering Parliamentary intention is the precept that Parliament must be taken to be aware of the social and historical context in which it makes its intention known." See also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53, at para. 45 (S.C.C.); *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] S.C.J. No. 58, [2006] 2 S.C.R. 846, at paras. 82-83 (S.C.C.); *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476, at paras. 25-26 (S.C.C.).

9 In *2747–3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919, at para. 238 (S.C.C.), L'Heureux-Dubé J. wrote: "It must be presumed that the Quebec legislature had knowledge of all the relevant law." See also *ATCO Gas and Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140, at para. 59 (S.C.C.); *R. v. Clarke*, [2013] O.J. No. 94, 2013 ONCA 7, at para. 20 (Ont. C.A.), affd [2014] S.C.J. No. 100 (S.C.C.); *Triad Gestco Ltd. v. Canada*, [2012] F.C.J. No. 1274, 2012 FCA 258, at para. 56 (F.C.A.).

10 See, for example, *R. v. St. Pierre*, [1995] S.C.J. No. 23, [1995] 1 S.C.R. 791, at para. 61 (S.C.C.), where Iacobucci J. noted, that "...Parliament can be assumed to have known that blood alcohol levels constantly change". See also *R. v. Ahmad*, [2011] S.C.J. No. 6, 2011 SCC 6, [2011] 1 S.C.R. 110, at para. 31 (S.C.C.): "We must presume that Parliament was aware of the possibility that proceedings would be needlessly stayed if the trial judge was denied access to material that could not be disclosed for valid reasons of state secrecy."

11 *Donovan v. Mccain Foods Limited*, [2004] N.J. No. 70, 2004 NLCA 12, at paras. 37-38 (Nfld. C.A.).

ple, a mastery of language is presupposed by the ordinary meaning rule while knowledge of practical affairs is presupposed by purposive analysis and in some cases by consequential analysis. A knowledge of law is presupposed by the presumption that the legislature does not intend to change existing law or to violate international law.

§8.11 Logically, the substance of what the legislature is presumed to know must be knowledge that was available to it at the time the legislation was enacted. The legislature is not presumed to know the future. To determine the mischief at which a statute was aimed, for example, the courts look to material conditions existing at the time of enactment. In practice, however, courts often assume, in the absence of evidence to the contrary, that the knowledge available to the interpreting court is the knowledge relied on by the enacting legislature.

§8.12 ***Presumed linguistic and drafting competence.*** The courts presume that the legislature is a skillful crafter of legislative schemes and provisions and that drafting has been done in accordance with standard drafting conventions.[12] It follows that legislative schemes are presumed to be coherent and effective, and provisions are presumed to be straightforward, exact, grammatically correct, concise and consistent.

§8.13 In *Re Canada 3000 Inc.*,[13] for example, the Supreme Court of Canada had to settle a dispute between NAV Canada, which was owed money by an insolvent airline, and the title holder of aircraft leased to the airline. Section 56 of the *Civil Air Navigation Services Commercialization Act* (CANSC) conferred on NAV Canada (the Corporation) the following remedy:

> **56.** (1) … [T]he Corporation may apply to the superior court of the province in which any aircraft owned or operated by the person liable to pay the charge is situated for an order … authorizing the Corporation to seize and detain any such aircraft until the charge is paid ….

Canada 3000 successfully argued in the courts below that since it was not personally liable for the debt, its right to repossess the aircraft on termination of the lease should take priority over NAV Canada's s. 56 remedy. The Supreme Court of Canada did not agree. Binnie J. made the following point:

> Many of the planes flown in and out of and across Canada were leased to, and flown by, airlines in, or close to, bankruptcy protection. Under the interpretation offered by [Canada 3000], the detention remedy would be opposable to everybody but the titleholder, whose aircraft is often the only asset to survive the financial wreckage. [On this interpretation,] Parliament would be taken to have intended a remedy that is least effective when it is most needed. It is more likely that Parliament fully appreciated that in dealing with aircraft flown in and out of

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12 *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, [2010] S.C.J. No. 28, 2010 SCC 28, [2010] 2 S.C.R. 61, at paras. 36-37 (S.C.C.); *Bowes v. Edmonton (City of)*, [2007] A.J. No. 1500, 2007 ABCA 347, at para. 154 (Alta. C.A.).

13 [2006] S.C.J. No. 24, [2006] 1 S.C.R. 865 (S.C.C.).

> jurisdictions under complex leasing arrangements, the only effective collection scheme is to render the aircraft themselves available for seizure, and thereafter to let those interested in them, including legal titleholders, registered owners, sublessors and operators, to resolve their dispute about where the money is to come from to pay the debts due to the service providers.[14]

Binnie J.'s argument here is persuasive. In preparing legislation, the executive branch generally expends considerable resources mastering what it needs to know to construct an effective and efficient legislative scheme.

§8.14 ***Presumed perfection.*** Although ordinary speakers or writers require much co-operative guesswork from their audience, a legislature is an idealized speaker. Unlike the rest of us, legislatures are presumed to always say what they mean and mean what they say. They do not make mistakes. In *Dillon v. Catelli Food Products Ltd.*, Ridell J.A. wrote:

> The modern principle is to credit the legislators with knowing what they intend to enact into law, and with a knowledge of the English language which enabled them to express their meaning.[15]

In *Spillers Ltd. v. Cardiff (Borough) Assessment Committee*, Lord Hewart said:

> It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily.[16]

In jurisdictions where legislation is drafted in more than one language, the legislature is presumed to express itself competently, and to the same purpose, in each of the languages in which it speaks.

§8.15 ***Can the presumptions of knowledge and competence be rebutted?*** The presumptions of knowledge and competence underlie both the ordinary meaning rule and judicial reluctance to declare and correct mistakes. They are also the basis for the textual analysis techniques examined in this chapter. Historically, these presumptions have been difficult to rebut. This explains the reluctance of courts to correct drafting errors and it may also explain the occasional reliance on interpretive maxims even when the resulting interpretation seems inappropriate.

§8.16 An important, but largely unaddressed, issue in statutory interpretation is whether the courts should receive evidence or take judicial notice of facts that would tend to rebut the presumptions of knowledge and competence — evi-

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14 *Re Canada 3000 Inc.*, [2006] S.C.J. No. 24, [2006] 1 S.C.R. 865, at para. 37 (S.C.C.). See also *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] S.C.J. No. 14, [2006] 1 S.C.R. 513 at para. 51 (S.C.C.); *Maritime Electric v. Summerside (City of)*, [2011] P.E.I.J. No. 24, 2011 PECA 13, at para. 130 (P.E.I.C.A.).

15 [1937] O.J. No. 262, [1937] O.R. 114, at 176 (Ont. C.A.).

16 [1931] 2 K.B. 21, at 43.

dence, for example, that a statute began as a private member's bill, was drafte under pressure or was subject to extensive, last minute amendment in commit tee, or evidence that the legislature relied on incomplete or inaccurate informa tion.

§8.17 Additional questions are whether the courts should take into account the evolution of drafting styles and conventions[17] or consider the impact of electronic publication and research on the statute book. Issues of this sort have received insufficient attention in the past. However, with the emergence of new drafting conventions as a result of plain language drafting initiatives and the federal Harmonization Program,[18] the courts may become more attuned to the realities of drafting practice. And with the relaxed rules concerning the admissibility of legislative history, the courts may be inclined to rely less on presumed knowledge and more on the knowledge actually brought to the legislature's attention.

§8.18 ***Presumption of straightforward expression.*** It is presumed that in so far as possible legislatures will adopt a simple, straightforward and concise way of expressing themselves. As Monnin J.A. wrote in *Re Medical Centre Apartments Ltd. and City of Winnipeg*:

> The Legislature is assumed to have used the clearest way of expressing its intention.[19]

This presumption may be relied on to reject an interpretation that the court finds implausible. In *Mitchell v. Peguis Indian Band*,[20] for example, the issue was whether a debt owed to the Indian Band by the Crown in right of Manitoba could be considered "personal property ... given to ... a band under a treaty or agreement between a band and Her Majesty". In rejecting the Band's argument in favour of a broad reading of this provision, La Forest J. wrote:

> ... the choice of the term "given" is decidedly an unhappy one if the section is meant to apply to any personal property that Indian bands could acquire pursuant

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17 In *Edmonton (City) v. 360Networks Canada Ltd.*, [2007] F.C.J. No. 340, 2007 FCA 106, [2007] 4 F.C.R. 747, at para. 64 (F.C.A.), leave to appeal refused [2007] S.C.C.A. No. 286 (S.C.C.), Evans J.A. wrote: "Sections 42 to 44 of the Act appear to have been drafted, in part at least, by 'cut and paste'. The history of statutory language should not determine the meaning of words or phrases when used in a relatively new Act if this would thwart the effective administration of the legislation." In *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] S.C.J. No. 50, 2009 SCC 50 [2009] 3 S.C.R. 309, at para. 12 (S.C.C.), the Court noted that a trade agreement incorporated into legislation may not follow the conventions of legislative drafting. See also *R. v. Dunsford*, [2013] O.J. No. 3462, 2013 ONCJ 416, at para. 10 (Ont. C.J.).

18 The Harmonization Program is discussed in Chapter 5, at §5.65*ff*.

19 [1969] M.J. No. 47, 3 D.L.R. (3d) 525, at 542 (Man. C.A.). See also *TransCanada Pipelines Ltd. v. Manitoba*, [2013] M.J. No. 368, 2013 MBCA 88, at para. 55 (Man. C.A.); *Enron Capital & Trade Resources Canada Corp. v. Blue Range Resource Corp.*, [2000] A.J. No. 1032, 2000 ABCA 239, at para. 37 (Alta. C.A.).

20 [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.).

> to the whole range of agreements that might be concluded with a provincial Crown. If that is the meaning Parliament wished the section to bear, it is hard to conceive of a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms.[21]

§8.19 In *Hasan v. 260 Wellesley Residence Ltd.*,[22] the issue was whether the local registrar could sign judgment in favour of a landlord when the landlord's claim to arrears of rent was disputed by the tenant. Moldaver J. wrote:

> In my opinion, when the various provisions of s. 113 of the Act are read as a whole, the question just posed must be answered in the negative. Were it otherwise, then surely the legislature would have worded s. 113(7) differently.
>
> The opening words of that provision are critical. They read:
>
> "Where the claim of the applicant is not disputed . . .".
>
> ... Had it been the intent of the legislature to so empower the registrar, I would have expected the opening words of s. 113(7) to read along the following lines: "Where the claim of the applicant is not disputed, or if disputed, the registrar is of the opinion that no real dispute exists ...".[23]

Along similar lines, in ruling that the registrar lacked power to award costs, Moldaver J. wrote:

> ... if it was the intention of the legislature under s. 106(5) to confer jurisdiction upon a registrar to award costs and disbursements, then it certainly took a roundabout route to achieve this. I am not prepared to accept any such interpretation.[24]

§8.20 In *Law Society of British Columbia v. Mangat*,[25] the Supreme Court of Canada held that the reference to "other counsel" in s. 69(1) of the *Immigration Act* effectively authorized non-lawyers to represent clients, for a fee, in proceedings before the Immigration and Refugee Board. Section 69(1) provided:

> In any proceedings before the Refugee Division, the person who is the subject of the proceedings may, at that person's own expense, be represented by a barrister or solicitor or other counsel.

Gonthier J. wrote:

> If Parliament had intended to limit the meaning of "other counsel" to unpaid non-lawyers, the section would have been drafted differently so as to make it clear that the phrase "at that person's own expense" only referred to barristers and solicitors and not to other counsel.

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21 *Ibid.*, at para. 74.
22 [1995] O.J. No. 1909, 24 O.R. (3d) 335, at 352 (Ont. Gen. Div.).
23 *Ibid.*, at 355.
24 *Ibid.*, at 352.
25 [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113 (S.C.C.).

> Had Parliament wanted to declare that "other counsel" means only unpaid persons, it would have said so by using distinctive terms....[26]

§8.21 ***Presumption of orderly and meaningful arrangement.*** It is presumed that in preparing the material that is to be enacted into law the legislature seeks an orderly and economical arrangement. Each provision expresses a distinct idea. Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflects a rational plan.

§8.22 Reliance on this presumption is illustrated in the dissenting judgment of La Forest J. in *R. v. Finta*.[27] One of the issues facing the Court in *Finta* was whether s. 7(3.71) of the *Criminal Code* created an offence or merely extended the territorial jurisdiction of Canadian courts. The section provided that

> Notwithstanding anything in this Act or any other Act, every person who ... commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada would constitute an offence ..., shall be deemed to commit that act or omission in Canada....

La Forest J. concluded that the section did not create an offence, but merely overcame the effect of s. 6(2) limiting the jurisdiction of Canadian courts to acts or omissions in Canada. He wrote:

> Parliament's intention to confine itself to a rule governing the application of offences is also evident from the position of s. 7(3.71) in the *Code*. It appears, I repeat, in Part I of the *Code*, which is appropriately titled "General". No offence is created in that Part. It deals, as its name implies, with interpretive matters, application, enforcement, defences and other general provisions. Offences are dealt with in other parts of the *Code*, and are usually entitled as such, among others "Part II. Offences Against Public Order", "Part VIII. Offences Against the Person and Reputation", "Part IX. Offences Against Rights of Property", and so on. One should assume some minimal level of ordering in an Act of Parliament. Had Parliament wished specifically to make war crimes and crimes against humanity domestic offences, it would have been much easier to do so directly, and I cannot imagine why it would have done so in the General Part of the *Code*.[28]

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26 *Ibid.*, at paras. 64-65. See also *R. v. Bouvier*, [2011] S.J. No. 463, 2011 SKCA 87, at para. 21 (Sask. C.A.); *Walsh v. Mobil Oil Canada*, [2008] A.J. No. 830, 2008 ABCA 268, at para. 75 (Alta. C.A.), *per* Ritter J.A.: "If the Legislature intended retaliation to have the same meaning as discrimination, it chose a strange way of expressing that intention. It would have been sufficient to merely list previous complaints as a prohibited ground of discrimination rather than setting up a separate subsection within the legislation to deal with the issue."

27 [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701 (S.C.C.).

28 *R. v. Finta*, [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701 at para. 35 (S.C.C.). See the dissenting judgment of L'Heureux-Dubé J. in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919, at paras. 201-204 (S.C.C.), where she relied on this presumption to conclude that the term "tribunal" in s. 23 of *Quebec's Charter of Human Rights and Freedoms* was limited to tribunals exercising penal jurisdiction. She wrote, at para. 202-203:

Although La Forest J. was dissenting, his analysis here is exemplary. In reaching its conclusion, the majority in *Finta* did not address this point.

THE PRESUMPTION AGAINST TAUTOLOGY

§8.23 ***Governing principle.*** It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain.[29] Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In *Hill v. William Hill (Park Lane) Ltd.*, Viscount Simons wrote:

> [Al]though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.[30]

In *R. v. Proulx*, Lamer C.J. wrote:

> It is a well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.[31]

As these passages indicate, every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.[32]

> The rule of interpretation is as follows: if a provision that deals with both field A and field non-A is placed in a series of provisions dealing only with field A, this is contrary to the principles of sound legislative drafting. This rule of interpretation applies directly to the situation in the case at bar.
>
> Section 23 is part of Chapter III of Part I of the Charter, which sets out 'Judicial Rights', including all guarantees of a penal or criminal nature: imprisonment, search and seizure, arrest, *habeas corpus*, presumption of innocence, etc. An interpretation of the term 'quasi-judicial' that covered both 'matters of penal significance' and 'non-penal' matters would, according to the above rule, be contrary to the principles of sound drafting, since there is no reference to the "non-penal" sphere in Chapter III of Part I of the Charter.

See also *R. v. Carvery*, [2012] N.S.J. No. 527, 2012 NSCA 107, at paras. 54*ff.* (N.S.C.A.), affd [2014] S.C.J. No. 27 (S.C.C.); *R. v. Bouvier*, [2011] S.J. No. 463, 2011 SKCA 87, at para. 21 (Sask. C.A.).

29 *Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] S.C.J. No. 37, [1985] 1 S.C.R. 831, at 838 (S.C.C.).

30 [1949] A.C. 530, at 546 (H.L.).

31 [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61, at para. 28 (S.C.C.).

32 See *Winters v. Legal Services Society*, [1999] S.C.J. No. 49, [1999] 3 S.C.R. 160, at para. 48 (S.C.C.): "The appellant's position would render [certain] words superfluous. This cannot have

§8.24 The presumption against tautology is invoked by the courts frequently and for a variety of purposes: to reveal ambiguity[33] or resolve it,[34] to infer the purpose of provisions,[35] to determine the scope of general terms, powers or conditions,[36] and to clarify the relation between the provisions of one or more Acts.[37] It applies both to individual words and phrases and to larger units of leg-

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been the intention of the legislature ... *Rizzo Shoes* ... makes it clear that all words in a statute must be given meaning." *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] S.C.J. No. 84, [1983] 2 S.C.R. 493, at 504 (S.C.C.): "Some meaning must be attributed to the word ... as otherwise it is mere surplusage, and courts in the application of the principles of statutory construction endeavour, where possible, to attribute meaning to each word employed by the Legislature in the statute." *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] S.C.J. No. 89, [1991] 3 S.C.R. 388, [1992] 1 W.W.R. 193, at 209 (S.C.C.): "It is a principle of statutory interpretation that every word of a statute must be given meaning". See also *Canadian Artists' Representation v. National Gallery of Canada*, [2014] S.C.J. No. 101, 2014 SCC 42, at para. 17 (S.C.C.); *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53, at para. 38 (S.C.C.); *R. v. Katigbak*, [2011] S.C.J. No. 48, 2011 SCC 48, at paras. 56-58 (S.C.C.); *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] S.C.J. No. 20, [2006] 1 S.C.R. 715, at paras. 45-46 (S.C.C.); *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, 74 C.R. (3d) 1, at 19 (S.C.C.); *Swan v. Canada (Minister of Transport)*, [1990] F.C.J. No. 114, [1990] 2 F.C. 409, at 431 (T.D.); *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] S.C.J. No. 37, [1985] 1 S.C.R. 831, at 838 (S.C.C.); *Goulbourn (Township) v. Ottawa-Carleton (Regional Municipality)*, [1979] S.C.J. No. 118, 101 D.L.R. (3d) 1, at 7, 13 (S.C.C.).

33 See, for example, *R. v. B. (G.) (No. 1)*, [1990] S.C.J. No. 59, [1990] 2 S.C.R. 3, at 27-28 (S.C.C.).

34 See, for example, *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46, 2008 SCC 45, [2008] 2 S.C.R. 604, at para. 20 (S.C.C.); *R. v. Clark*, [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6, at para. 51 (S.C.C.); *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, [2005] 2 S.C.R. 539, at paras. 31, 39 (S.C.C.); *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at para. 62 (S.C.C.); *Re Therrien*, [2001] S.C.J. No. 36, [2001] 2 S.C.R. 3, at para. 120 (S.C.C.); *R. v. Z. (D.A.)*, [1992] S.C.J. No. 80, [1992] 2 S.C.R. 1025, at 1044-48 (S.C.C.); *Davidson v. Canada (Board of Referees, Unemployment Insurance)*, [1987] F.C.J. No. 536, 80 N.R. 268, at 269 (F.C.A.); *Extendicare Health Services Inc. v. Canada (Minister of National Health & Welfare)*, [1987] F.C.J. No. 819, 15 F.T.R. 187, at 190-91 (T.D.), revd [1989] F.C.J. No. 538, [1989] 3 F.C. 593 (F.C.A.); *Swan v. Canada (Minister of Transport)*, [1990] F.C.J. No. 114, [1990] 2 F.C. 409, at 431 (T.D.).

35 See, for example, *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at para. 20 (S.C.C.); *Reference re Criminal Code (Canada), Sections 193 & 195(1)(c)*, [1990] S.C.J. No. 52, [1990] 4 W.W.R. 481, at 553 (S.C.C.).

36 See, for example, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53, at para. 38 (S.C.C.); *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] S.C.J. No. 58, [2006] 2 S.C.R. 846, at paras. 36, 57, 81 (S.C.C.); *Winters v. Legal Services Society*, [1999] S.C.J. No. 49, [1999] 3 S.C.R. 160, at para. 61 (S.C.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 42 (S.C.C.); *Grini v. Grini*, [1969] M.J. No. 53, 5 D.L.R. (3d) 640, at 644-45 (Man. Q.B.); *R. v. Green*, [1992] S.C.J. No. 18, [1992] 1 S.C.R. 614, at 615 (S.C.C.).

37 See, for example, *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at para. 52 (S.C.C.); *R. v. Proulx*, [2000] S.C.J. No. 6, 2000 SCC 5 (S.C.C.); *Morguard Properties Ltd. v. City of*

islation such as paragraphs and sections and to parts of the legislative scheme.[38] It applies to the Charter and other constitutional instruments as well as to ordinary legislation.[39]

§8.25 In *R. v. Kelly*,[40] the Supreme Court of Canada relied on the presumption against tautology to help determine the elements of the offence created by s. 426(1) of the *Criminal Code*. That subsection provided that a person is guilty of an offence if, while acting as an agent, he or she "corruptly ... agrees to accept ... any reward, advantage or benefit" as consideration for an act or omission that affects the principal's affairs. The Court was asked whether an agent, to be guilty of the offence, must do something more than accept a benefit in return for an act or omission that affects the principal. The majority of the Court said yes, on the ground that some meaning must be given to the word "corruptly". Cory J. wrote:

> The interpretation of the word "corruptly" must take place within the context of s. 426 itself. It is a trite rule of statutory interpretation that every word in the statute must be given a meaning. It would be superfluous to include "corruptly" in the section if the offence were complete upon the taking of the benefit in the circumstances described by the section. The word must add something to the offence.[41]

The Court concluded that the word "corruptly" as used in the section was intended to make secrecy an essential element of the offence.

§8.26 In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*,[42] the Supreme Court of Canada relied on the presumption against tautology to help rebut the presumption against changing the common law. The issue in the case was whether s. 8 of the *Competition Tribunal Act* gave the Tribunal jurisdiction to enforce its orders through punishment for contempt *ex facie curiae*. At common law this jurisdiction is reserved to superior courts. Under s. 8(1) of the Act, the Tribunal had "jurisdiction to hear and determine all applications made under Part VII of the *Competition Act* and any matters related thereto". Under s. 8(2) it had the powers, rights and privileges of a superior court in relation to all matters necessary or proper for the due exercise of its jurisdiction.

Winnipeg, [1983] S.C.J. No. 84, [1983] 2 S.C.R. 493, at 504-505 (S.C.C.); *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, at 76 (S.C.C.); *Menzies v. Manitoba Public Insurance Corp.*, [2005] M.J. No. 313 (Man. C.A.), at paras. 45, 48-49 (Man. C.A.).

38 See *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] S.C.J. No. 127, [1989] 2 S.C.R. 1297, at 489 (S.C.C.).

39 See, for example, *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, 46 C.R.R. 193, at 215 (S.C.C.).

40 [1992] S.C.J. No. 53, [1992] 2 S.C.R. 170 (S.C.C.).

41 *Ibid.*, at 188. See also *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, 2014 SCC 36, at para. 24 (S.C.C.); *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, at para. 45 (S.C.C.); *Wormell v. Insurance Corp. of British Columbia*, [2011] B.C.J. No. 621, 2011 BCCA 166, at paras. 22-27 (B.C.C.A.).

42 [1992] S.C.J. No. 64, [1992] 2 S.C.R. 394 (S.C.C.).

§8.27 The majority of the Court concluded that although s. 8 did not confer jurisdiction to punish for contempt *ex facie curiae* in so many words, it did so by necessary implication. Its reasoning was based in part on the need to give meaning to the expression "any matters relating thereto" in s. 8(1). Gonthier J. explained:

> The respondent claimed that the phrase "any matters related thereto" essentially added to the Tribunal's jurisdiction various ancillary matters that may arise in the course of the hearing of an application. Such an interpretation would, in my opinion, fail to give its full meaning to s. 8(1) *CTA*. It is an established principle of common law, codified to a certain extent in s. 31 of the *Interpretation Act*, R.S.C., 1985, c. I-21, that "[t]he powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured".... Since the Tribunal has jurisdiction to hear and determine Part VIII applications, the common law would have conferred upon it jurisdiction over incidental and ancillary matters arising in the course of the hearing and determination. No need would arise to add the phrase "and any matters related thereto". Since this phrase should be given some meaning, it should be taken as a grant of jurisdiction over matters related to Part VIII applications, but arising *outside* of the hearing and determination of these applications. These matters may include for instance the enforcement of the orders made under Part VIII.[43]

The *Chrysler* case illustrates the frequent interaction of the presumption of knowledge with the presumption against tautology. The Court here presumes first that the legislature is aware of the law governing powers conferred on tribunals (presumption of knowledge) and second that it would not waste words by conferring a power on a tribunal that it already enjoys (presumption against tautology).[44]

§8.28 ***Rebuttal.*** Although the presumption against tautology is frequently invoked, it is also easily rebutted. This is done by identifying a meaning or function for the words in question, to show that they are not in fact meaningless or superfluous. In *R. v. Biniaris*,[45] for example, counsel argued that in order to avoid tautology the appeal against an unreasonable verdict referred to in s. 686(1) of the *Criminal Code* must be an appeal on a question of fact. The section referred to the following grounds for appeal:

> (i) the verdict should be set aside on the ground that it is unreasonable...,
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law....

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43 *Ibid.*, at 410-11.

44 For similar reasoning, see *Trick v. Trick*, [2006] O.J. No. 2737, 81 O.R. (3d) 241, at para. 45 (Ont. C.A.); *Temelini v. Ontario Provincial Police (Commissioner)*, [1999] O.J. No. 1876, 44 O.R. (3d) 609, at 618 (Ont. C.A.); *Davidson v. Canada (Board of Referees, Unemployment Insurance)*, [1987] F.C.J. No. 536, 80 N.R. 268, at 269 (F.C.A.) and *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] S.C.J. No. 89, [1991] 3 S.C.R. 388, [1992] 1 W.W.R. 193, at paras. 23-24 (S.C.C.).

45 [2000] S.C.J. No. 16, [2000] 1 S.C.R. 381 (S.C.C.).

Counsel argued that since para. (ii) effectively covered questions of law, para. (i) must refer to something else. This argument did not succeed in the Supreme Court of Canada. Arbour J. wrote:

> The reasoning is that if [the appeal from an unreasonable verdict] were a question of law, there would be no need for both s. 686(1)(a)(i) and s. 686(1)(a)(ii).... This inference from the wording of the two subsections is far from inescapable....[46]

Arbour J. pointed out several reasons why it would make sense to include para. (i) even if unreasonable verdicts were treated as raising a question of law. For example, para. (ii) arguably refers to decisions of the trial judge on specific questions of substantive law, procedure and evidence arising during the course of trial whereas para. (i) refers to conclusion of the judge or jury on the ultimate issue of guilt or innocence.[47]

§8.29 The presumption can also be rebutted by suggesting reasons why in the circumstances the legislature may have wished to be redundant or to include superfluous words. Drafters sometimes anticipate potential misunderstandings or problems in applying the legislation and, in an effort to forestall these difficulties, resort to repetition or the inclusion of unnecessary provisions. In the *Chrysler* case, for example, in a dissenting judgment, McLachlin J. conceded that the phrase "and any matters related thereto" appearing in the *Competition Tribunal Act* would be unnecessary if its only function were to confer ancillary powers on the Tribunal. However, in her view,

> one must approach such general phrases against the background that they are commonly used in many statutes, not to confer unmentioned powers, but to ensure that the powers clearly given be exercised without undue restraint. It is true, as Gonthier J. points out, that ancillary powers can be inferred and need not be set out. *Yet the reality is that statutes commonly do set them out, if only in the hope of avoiding arguments seeking to unduly restrict the effective exercise of expressly conferred powers....* Given the relatively common use of phrases like 'and all [or any] matters related thereto' in legislative drafting, I do not find [Mr. Justice Gonthier's] argument persuasive.[48]
>
> [Author's emphasis]

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46 *Ibid.*, at para. 29.

47 *Ibid.*; see also *Zaidan Group Ltd. v. London (City)*, [1990] O.J. No. 33, 64 D.L.R. (4th) 514 (Ont. C.A.), affd [1991] S.C.J. No. 92, [1991] 3 S.C.R. 593 (S.C.C.); *Clarke v. Clarke*, [1990] S.C.J. No. 97, [1990] 2 S.C.R. 795, 73 D.L.R. (4th) 1, at 16 (S.C.C.); *Musqueam First Nation v. British Columbia (Assessor of Area #09)*, [2012] B.C.J. No. 837, 2012 BCCA 178, at para. 64 (B.C.C.A.); *Firestone Canada Inc. v. Ontario (Pension Commission)*, [1990] O.J. No. 1377, 74 O.R. (2d) 325, at 339 (Ont. H.C.J.), revd [1990] O.J. No. 2316, 1 O.R. (3d) 122 (Ont. C.A.).

48 *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] S.C.J. No. 64, [1992] 2 S.C.R. 394, at 435 (S.C.C.). See also *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at para. 55 (S.C.C.): " ...the additional words are not intended to add to the meaning of benefit, but to prevent the meaning ... from being restricted."

§8.30 A similar point was made by the Manitoba Court of Appeal in *Tuteckyj v. Winnipeg (City)*.[49] In that case the Court was required to interpret the following standard, breach of which would result in "unsightly premises" for the purposes of the regulation. This standard contained considerable overlap and redundancy.

> 5(1) Premises must be kept free and clean from:
>
> (a) rubbish, garbage, junk and other debris;
>
> (b) wrecked, dismantled, partially dismantled, inoperative, discarded, abandoned or unused vehicles, trailers and other machinery or any parts thereof;
>
> (c) excessive growth of weeds or grass; and
>
> (d) objects and conditions, including holes and excavations, that are health, fire or accident hazards.

In considering whether these paragraphs had to be treated as mutually exclusive in order to avoid tautology, Beard J.A. concluded that the overlap and redundancy were deliberate:

> All of these provisions ... form the definition of 'unsightly' in the By-law. It is clear that the legislation was not drafted with the intention that the words and provisions would be separate and exclusive. The only possible explanation for the use of these words and provisions is that the drafters intended to use repetition and superfluous words to ensure the clearest and widest possible meaning to the word 'unsightly.' This is not surprising, given that what is considered to be 'unsightly' is very subjective and even elusive. It would be impossible to list all of the myriad of ways in which a property could be considered to be unsightly. The use of overlapping and repetitive words and provisions is that the drafters intended to avoid loopholes and to provide clarity in the legislation.[50]

Because the redundancy served a function, the presumption against tautology was rebutted.

§8.31 Repetition or superfluous words may also be introduced to make the legislation easier to read or work with or, in the case of bilingual legislation, to preserve parallelism between the two language versions. Repetition is not an evil when it serves an intelligible purpose. When tautologous words are deliberately included in legislation for reasons such as these, the courts say they are added *ex abundanti cautela*, out of an abundance of caution, and the presumption against tautology is rebutted.[51]

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49 [2012] M.J. No. 370, 2012 MBCA 100 (Man. C.A.).

50 *Ibid.*, at para. 74.

51 *Québec (Procureur général) c. Syndicat de la fonction publique du Québec*, [2008] J.Q. no 4945, 2008 QCCA 1054, at para. 65 (Que. C.A.), revd [2010] S.C.J. No. 28 (S.C.C.); *Mime'j Seafoods Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2007] N.S.J. No. 502, 2007 NSCA 115, at para. 41 (N.S.C.A.).

THE PRESUMPTION OF CONSISTENT EXPRESSION

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

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

§8.34 ***Same words, same meaning.*** In *R. v. Zeolkowski*, Sopinka J. wrote: "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."[52] Reliance on this principle is illustrated in the majority judgment of the Supreme Court of Canada in *Thomson v. Canada (Deputy Minister of Agriculture)*.[53] The issue there was whether a Deputy Minister of the federal government could deny security clearance to a person, contrary to the recommendation made by the Security Intelligence Review Committee after reviewing the person's file. The governing provision was s. 52(2) of the *Canadian Security Intelligence Act* which provided that on completion of its investigation, the Review Committee shall provide the Minister "with a report containing any recommendations that the Committee considers appropriate". The majority held that the ordinary meaning of the word "recommendations" is advice or counsel and that mere advice or counsel is not binding on the Minister. However, Cory J. added:

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

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52 [1989] S.C.J. No. 50, [1989] 1 S.C.R. 1378, at 1387 (S.C.C.).

53 [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385 (S.C.C.).

> subsection of the same section to receive a different interpretation. The word must have the same meaning in both subsections.[54]

§8.35 The reasoning of Cory J. is exemplary. He first notes that elsewhere in the legislation the word or expression to be interpreted has a single clear meaning; he then invokes the presumption of consistent expression to justify his conclusion that this meaning must prevail throughout. Finally, he points out that the presumption applies with particular force where the provisions in which the repeated words appear are close together or otherwise related. This way of resolving interpretation problems is often relied on in the cases.[55]

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

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.[56]

This reasoning was relied on in several Supreme Court of Canada decisions interpreting the insanity defence provisions of the *Criminal Code*. Section 16(1) provides that a person is insane only if he or she is "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong". In *R. v. Schwartz*, Dickson J. argued that the word "wrong" must mean morally wrong and not illegal because elsewhere in the Code the term "unlawful" is used to express the idea of illegality; by using the word "wrong" the legislature must

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

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

56 [2000] F.C.J. No. 894, 257 N.R. 193, at para. 12 (F.C.A.). See also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 81-84 (S.C.C.); *Lukács v. Canada (Transportation Agency)*, [2014] F.C.J. No. 301, 2014 FCA 76, at para. 41 (F.C.A.); *British Columbia (Attorney General) v. Beacon Community Services Society*, [2013] B.C.J. No. 1465, 2013 BCCA 317, at paras. 25-26 (B.C.C.A.); *Swailes v. Insurance Corporation of British Columbia*, [2011] B.C.J. No. 319, 2011 BCCA 95, at para. 16 (B.C.C.A.); *Shier v. Manitoba Public Insurance Corp.*, [2008] M.J. No. 305, 2008 MBCA 97, at para. 52 (Man. C.A.).

have meant to express a different idea.[57] In *R. v. Barnier*[58] the issue was whether the trial judge had erred in instructing the jury that the words "appreciating" and "knowing" in s. 16(2) mean the same thing. Estey J. wrote:

> One must, of course, commence the analysis of a statutory provision by seeking to attribute meaning to all the words used therein. Here Parliament has employed two different words in the critical portion of the definition, which words in effect established two tests or standards in determining the presence of insanity.... Under the primary canon of construction to which I have referred, "appreciating" and "knowing" must be different, otherwise the Legislature would have employed one or the other only.[59]

As this passage from the *Barnier* case indicates, the presumption that using different words implies an intention to express different meanings is often reinforced by the presumption against tautology. In *R. v. Clark*,[60] for example, the issue was whether performing an indecent act in an illuminated room near an uncovered window violated s. 173(1)(a) of the *Criminal Code*. The relevant provisions were in the following terms:

> 150. In this Part,
>
> ...
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;
>
> 173. (1) Every one who wilfully does an indecent act
>
> (a) in a public place in the presence of one or more persons,
>
> ...
>
> is guilty of an offence punishable on summary conviction.
>
> 174.(1) Every one who, without lawful excuse,

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57 [1976] S.C.J. No. 40, [1977] 1 S.C.R. 673, at 677-90 (S.C.C.), *per* Dickson J. dissenting; approved by Lamer C.J. for the majority of the Court in *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, at 39-41 (S.C.C.). See also *Frank v. The Queen*, [1977] S.C.J. No. 42, [1978] 1 S.C.R. 95, at 101 (S.C.C.), *per* Dickson J.: "I do not think 'Indians of the Province' and 'Indians within the boundaries thereof' refer to the same group. The use of different language suggests different groups."; *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85, at 123-124 (S.C.C.), *per* La Forest J.: "... whenever Parliament meant to include Her Majesty in right of a province, it was careful to make it clear by using explicit terms. In the absence of such specific indication, ... one would expect that an unqualified reference to 'Her Majesty' should be taken as limited to the federal Crown." See also *Walsh v. Mobil Oil Canada*, [2008] A.J. No. 830, 2008 ABCA 268, at para. 74 (Alta. C.A.).

58 [1980] S.C.J. No. 33, [1980] 1 S.C.R. 1124 (S.C.C.).

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

60 [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6 (S.C.C.).

> (a) is nude in a public place, or
>
> (b) is nude and exposed to public view while on private property, ...
>
> is guilty of an offence punishable on summary conviction.

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

> Section 174(1) makes it perfectly clear that the definition of "public place" in s. 150 of the *Criminal Code* was not meant to cover private places exposed to public view. Were it otherwise, s. 174(1)(*b*) would be entirely superfluous.
>
> Section 150 applies equally to s. 174(1) and s. 173(1)(*a*). If "public place" does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(*a*). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form *simultaneously*, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical words should have different meanings in two consecutive and related provisions of the very same enactment.[61]
>
> [Emphasis in original]

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

§8.38 ***Recurring pattern of expression.***[62] The presumption of consistent expression applies not only to individual words, but also to patterns of expression. In *Kirkpatrick v. Maple Ridge (District)*,[63] for example, the Supreme Court of Canada was concerned with a provision of British Columbia's *Municipal Act* which conferred on municipalities a power to require permits for the removal of soil or other substances and to "fix a fee for the permit". The question was whether this authorized the imposition of a flat fee for all holders, a fee proportionate to the amount of substance removed by each holder, or both. In concluding that the fee must be flat, the Court relied on the pattern apparent in the Act of setting out the basis for differential fees when such fees were contemplated, but simply providing for the imposition of the fee when the same rate was to be charged to all. La Forest J. wrote:

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

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

63 [1986] S.C.J. No. 47, [1986] 2 S.C.R. 124 (S.C.C.).

> The foregoing [conclusion] is strongly fortified by the terms of other taxing and licensing provisions in the Act.... Under s. 612(2), a council may vary the charge for sewerage or combined sewerage and drainage facilities in accordance with a number of outlets served and the quantity of water delivered. Development cost charges "may vary in respect of different defined or specified areas ... and sizes or number of units or lots ..." (s. 719(5)). Municipal councils are even empowered to vary the amount of the fees for dog licences according to sex, age, size or breed (s. 524). Flat fees have been set for many other licences (ss. 505(1), 520(1))....[64]

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

§8.39 Similar reasoning is found in *Canada v. Antosko*,[65] where the Supreme Court of Canada had to interpret s. 20(14) of the *Income Tax Act*. It provided that when title in an interest-bearing security passes from transferor to transferee and interest accrued before the day of transfer is paid to the transferee, that amount:

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

The issue was whether a transferee could have the benefit of para. (b) even though the transferor was not obliged to include the pre-transfer interest in its

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64 *Ibid.*, at 129. In *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, [2010] S.C.J. No. 28, 2010 SCC 28, [2010] 2 S.C.R. 61 (S.C.C.), an important issue was whether s. 124 of the *Act respecting labour standards*, (the A.L.S) was implicitly incorporated into the collective agreement in question. In concluding that it was not, LeBel J. wrote, at paras. 36-37, that the implicit incorporation argument "disregards the drafting techniques used by the Quebec legislature when it intends to incorporate a specific standard into collective agreements or individual contracts of employment.... There is no reason to think that the legislature chose to use two different drafting techniques to achieve the same result in the same statute. To conclude that it did so would be inconsistent with the presumption that a change in the term used to express a legal concept indicates a change in meaning and that a term generally retains the same meaning throughout a statute....". See also *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] S.C.J. No. 6, 2013 SCC 6, at paras. 147-148 (S.C.C.); *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, [2011] S.C.J. No. 60, 2011 SCC 60, at paras. 31-32 (S.C.C.); *Contino v. Leonelli-Contino*, [2005] S.C.J. No. 65, [2005] 3 S.C.R. 217, at paras. 23-24 (S.C.C.); *Montreal (City) v. Civic Parking Centre Ltd.*, [1981] S.C.J. No. 96, [1981] 2 S.C.R. 541 (S.C.C.); *R. v. Summers*, [2013] O.J. No. 1068, 2013 ONCA 147, at paras. 71-75 (Ont. C.A.), affd [2014] S.C.J. No. 26 (S.C.C.).

65 [1994] S.C.J. No. 46, [1994] 2 S.C.R. 312 (S.C.C.).

own income as contemplated by para. (a). The Court held that para. (b) applied independently of para. (a). Iacobucci J. wrote:

> In this regard I find helpful the comments of M.D. Templeton ...[66]
>
> > The grammatical structure of subsection 20(14) is similar to a number of other provisions in the Act in which Parliament lists the income tax consequences that arise when certain preconditions are met. Usually, the preconditions are set out in an introductory paragraph or paragraphs and the consequences in separate subparagraphs. We do not know of any canon of statutory interpretation that makes a tax consequence listed in the text of a provision subject to the taxpayer's compliance with all the other tax consequences listed before it.
>
> To carry this observation further, where specific provisions of the *Income Tax Act* intend to make the tax consequences for one party conditional on the acts or position of another party, the sections are drafted so that this interdependence is clear: see, *e.g.*, ss. 68, 69(5), 70(2), (3) and (5).[67]

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

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

§8.41 In *Miller, McClelland Ltd. v. Barrhead Savings & Credit Union Ltd.*,[68] for example, the issue was whether a creditor lost his security interest because he registered the security under the name he used in practice (James Smith) as opposed to the name on his birth certificate (Robert James Smith). Subsection 17(1) of the *Personal Property Regulations* provided:

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

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

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

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

68 [1995] A.J. No. 167 (Alta. C.A.).

> The term "first name" is not defined. The *Vital Statistics Act* ... describes the name on the birth certificate as the "given name." The *Change of Name Act* ... defines "name" to mean ... a given name or surname or both." Had the legislators intended to circumscribe the registration requirement under the P.P.S.A. regulations as suggested, no doubt they would have adopted the more precise term "given name" found in other provincial legislation.[69]

§8.42 When the pattern on which a counterfactual argument is based is express reference to something, the implied exclusion maxim comes into play.[70] In *Ordon Estate v. Grail*,[71] for example, the Supreme Court of Canada had to determine whether the Ontario Court (General Division) had concurrent jurisdiction with the Federal Court, Trial Division over maritime fatal accident claims by dependants under s. 646 of the *Canada Shipping Act*. In concluding that it did, Iacobucci and Major JJ. wrote:

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

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

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

71 [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.).

> exclusive jurisdiction to the Admiralty Court in maritime fatal accident claims, language similar to that in ss. 209(2), 453 and 580(1) would have been used.[72]

§8.43 ***Factors affecting weight of presumption.*** The presumption of consistent expression varies in strength depending on a range of factors. An important consideration is the proximity of the words to one another. As Rothstein J.A. wrote in *Barrie Public Utilities v. Canadian Cable Television Assn.*, words in a statute may have different meanings depending on the context in which they are used, but "it seems unlikely that Parliament intended that a term in a single subsection should have different meanings depending upon different factual circumstances."[73] Other considerations include how often the language in question is repeated in the legislation, the similarity of the contexts in which it is repeated, the extent to which it constitutes a distinctive pattern of expression, the range of matters dealt with in the legislation and how often it has been amended.

§8.44 In *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*,[74] the Supreme Court of Canada insisted that the word "income" must have the same meaning throughout Part II of the *Income Tax Act* because formulating an exact definition of "income" and then indicating how it is to be taxed was the central concern of that Part. Wilson J. wrote:

> ... a taxing statute is a highly technical piece of legislation which requires an interpretation that will ensure certainty for the taxpayer. Many of the words used carry a very specific and technical meaning because they identify the fundamental concepts underpinning the legislation. 'Income' is one of those fundamental concepts.[75]

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

§8.45 One problem with the presumption of consistent expression is that it does not necessarily reflect the realities of legislative drafting. Much legislation is lengthy and complicated; there is not always time for careful editing. In recent years, federal Budget Bills have introduced massive changes to the statute book affecting legislation administered by many departments and agencies. The time lines for these Bills do not permit drafters to conduct a proper review of the pro-

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72 *Ibid.*, at para. 60.

73 [2001] F.C.J. No. 1150, [2001] 4 F.C. 237, at para. 23 (F.C.A.), affd [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 (S.C.C.). See also *Leßlanc v. Boisvert*, [2005] N.B.J. No. 561, at para. 51 (N.B.C.A.), where Drapeau, C.J.N.B. wrote: "Because sections 265.1 and 232(1) are so closely related, it makes eminent good sense to attribute the same meaning to the phrase 'arising out of the use or operation' found in s. 265(1) and the phrase 'arising from the [...] use or operation' in s. 232(1)." [Brackets and ellipsis in original]. See also *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385 (S.C.C.), at 400-01.

74 [1988] S.C.J. No. 72, [1988] 2 S.C.R. 175 (S.C.C.).

75 *Ibid.*, at para. 20.

posed changes to ensure consistency or coherence. In addition, amendments that are proposed by legislative committees during the legislative process are often drafted with little regard for their relation to the Act as a whole or the statute book. Some statutes, like Insurance Acts or the *Criminal Code*, are frequently amended year after year. It is not surprising, then, that inadvertent variations occur within a single Act.[76] It is even more likely that they would occur within the statute book as a whole.

§8.46 A second problem with the presumption, as pointed out by Côté, is that it conflicts to some extent with the contextual principle in interpretation, which emphasizes that meaning is dependent on context.[77] Identical words may not have identical meanings once they are placed in different contexts and used for different purposes.[78] This is particularly true of general or abstract words. These factors tend to weaken the force of the presumption so that in many cases the courts assign it little weight.[79]

§8.47 Finally, like all the presumptions of interpretation, the presumption of consistent expression must be weighed against relevant competing considerations. A good example is found in the dissenting judgment of Dickson C.J. in *Mitchell v. Peguis Indian Band*.[80] One of the issues in the case was whether the expression "Her Majesty" in s. 90(1)(b) of the *Indian Act* referred solely to the federal Crown or included provincial Crowns as well. Dickson C.J. conceded that in s. 90(1)(a) the words "Her Majesty" were clearly limited to the Crown in right of Canada and that this usage was found in many places in the Act. He also conceded that elsewhere in the Act other expressions were used when referring

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

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

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

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

80 [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.). See also the strong dissenting judgment in *Canada (Attorney General) v. Savard*, [1996] Y.J. No. 4 (Y.T.C.A.), where Wood J.A. appreciates the consistent pattern found in the legislation but concludes, at para. 47*ff.*, that the presumption of consistency must give way to the clear purpose of the legislature: "Where, as here, the application of the presumption of consistent expression would give rise to a result quite inconsistent with the apparent purpose or intention of Parliament, it ought to yield, as would a good servant, rather dominate as a master" (para. 60).

to the Crown in right of the provinces. All this amounted to a strong case fo applying the presumption of consistent expression. Yet Dickson C.J. refused t be bound. In his view, the arguments based on the meaning of "Her Majesty elsewhere in the text were not conclusive.[81] He preferred to give more weight t the presumption in favour of Aboriginal peoples than to the presumption of con sistent expression.[82] The latter is merely a drafting convention, whereas the for mer embodies an important constitutional policy.

§8.48 The presumption rebutted. The judgment of the Supreme Court o Canada in *New Brunswick (Human Rights Commission) v. Potash Corporatio of Saskatchewan Inc.*[83] is a good example of a case in which the presumption o consistency is rebutted. Subsection 3(1) of New Brunswick's *Human Right Code* prohibited an employer from discriminating against any person in relatio to employment on the basis of age. However, ss. 3(5) and (6) qualified the pro hibition:

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

In 2004, an employee of the respondent complained that the company had discriminated against him when it required him to retire at age 65 in accordance with the mandatory retirement policy in its pension plan. To determine whether the company's mandatory retirement policy was *bona fide*, the Commission applied the so-called *Meiorin* test[84] developed to determine whether discriminatory occupational requirements are *bona fide*.

§8.49 Given that the term "bona fide" is used in adjacent subsections in the Code, the Commission's approach was supported by the presumption of consistent expression. However, a majority of both the New Brunswick Court of Ap-

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81 *Ibid.*, at 105-06.

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

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

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

peal and the Supreme Court of Canada concluded that the meaning of "bona fide" was different in the two subsections. Abella J. wrote:

> ... I do not accept that the words '*bona fide*' in s. 3(6)(*a*) attract the same analysis in s. 3(6)(*a*) as they do in s. 3(5) ....
>
> There is no doubt that the words '*bona fide*' have a unique pedigree in human rights jurisprudence. When the words are used together with 'occupational qualification', 'occupational requirement' or 'reasonable justification', they have a well-understood meaning and represent an accepted term of art in the human rights world. With respect for the contrary view, the importance of the words '*bona fide*' in Canadian human rights law is not undermined by the recognition that, when they are used to qualify a different provision in a different context, they are to be given their ordinary meaning of 'good faith'.[85]

She also pointed out that "If both ss. 3(6)(*a*) and 3(5) meant the same thing, both requiring a *Meiorin* analysis, s. 3(6)(*a*) would be redundant."[86]

PART 2 TEXTUAL ANALYSIS AND THE MAXIMS OF INTERPRETATION

§8.50 In textual analysis the interpreter draws inferences about the intended meaning of a disputed word or phrase based on the grammatical, conventional and logical relations between the disputed words and the rest of the legislative text. This text may consist of the rest of the provision, a division or part, the Act as a whole or the statute book as a whole. The inferences drawn point to the intended sense or scope of the disputed words.

INTRODUCTION

§8.51 ***Basic technique.*** When an interpreter analyzes a text, he or she draws inferences about what the author must have intended given the words used and the circumstances in which they were used. This process of drawing inferences is varied, ranging from what is obvious and incontestable (and therefore not worth mentioning) to connections and implications that are subtle or based on contestable assumptions. Drawing inferences usually takes place automatically, without conscious thought;[87] in formal interpretation, however, it should be deliberate and explicit. Ideally, interpreters should offer an explanation of how they moved from the words of the text and their context to a conclusion about what the text means.

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

86 *Ibid.*, at para. 20.

87 For a description of the sort of analyses that every interpreter engages in without conscious thought, see *supra*, Chapter 3, at §3.12, §3.14, §3.16.