Court File No.: CV-16-125250-00

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE REGIONAL MUNICIPALITY OF YORK
SIMCOE MUSKOKA DISTRICT HEALTH UNIT AND THE REGIONAL MUNICIPALITY OF PEEL

Applicants

– and –

MICHAEL SCHMIDT, ELISA VANDER HOUT,
MARKUS CHRISTIAN SCHMIDT,
AGRI-CULTURAL RENEWAL CO-OPERATIVE INC.,
NIKOLAUS ALEXANDER JOHANNES OSTHAUS,
JOHN DOE, JANE DOE and PERSONS UNKNOWN and
THE CHURCH OF THE CHRISTIAN COMMUNITY IN CANADA

Respondents

BRIEF OF AUTHORITES OF THE APPLICANTS,
THE REGIONAL MUNICIPALITY OF YORK, SIMCOE MUSKOKA DISTRICT HEALTH UNIT and THE REGIONAL MUNICIPALITY OF PEEL
(*Application for Injunction and Ancillary Relief*)

May 9, 2017

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TAB 1

Citation: *R. v. Schmidt,* 2010 ONCJ 9

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Ontario Court of Justice
Provincial Offences Court
(Newmarket)

Regina

V

Michael Schmidt

Before

His Worship P. Kowarsky
Justice of the Peace

Charges

Health Protection and Promotion Act, R.S.O. 1990, C. H.7, Sections 18(1), 18(2) and 100 (1)
Milk Act, R.S.O. 1990, c. M.12, Sections 15 (1) and 15(2)

Reasons for Judgment

Judgment: January 21, 2010

Counsel:

Alan Ryan: Counsel for the Ministry of Natural Resources

John Middlebro: Counsel for the Grey Bruce Health Unit

Shannon Chace: Counsel for the Intervener, Attorney General of Ontario

Michael Schmidt: Self-represented.

R. v. Schmidt

A. Introduction

1. The defendant is Michael Schmidt, a dairy farmer who carries on business as such in Durham, Ontario under the name of Glencolton Farms, which is registered as a sole proprietorship under the Business Names Act, R.S.O. 1990. c. B. 17. At any one time, he has about 30 cows on his farm.

2. On this organic farm the defendant produces a large variety of foodstuffs including breads, meats, confectionery, fruits and vegetables as well as milk and milk products of various kinds, including cheeses.

3. The products are sold by the defendant from a farm store which is located on the farm. In addition, the defendant owns a bus which he converted from a school bus into a bus for the display and sale of his farm products. Once a week, the defendant drives this bus, which he calls the blue bus, from his farm into the city of Vaughan, parks it in the grounds of a private school, and sells his products from the bus.

B. The Charges

4. The defendant was charged with the following 20 offences:

6 charges contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H7 ("HPPA");
8 charges contrary to section 18(2) of the HPPA;
3 charges contrary to section 100(1) of the HPPA;
2 charges contrary to section 15(1) of the Milk Act, R.S.O. 1990, c. M 12 ("Milk Act");
1 charge contrary to section 15(2) of the Milk Act.

5. During the course of the trial Crown Counsel Ryan withdrew one charge of operating a plant without a licence under section 15(1) of the Milk Act on Information number 073089, leaving 19 charges in all. Mr. Ryan advised that this charge was a duplication of count #1 on Information number 073270.

6. Three charges are contained in one Information, which was sworn by Andrew Barton, a Public Health Inspector employed by the Grey Bruce Health Unit. I will refer to these three charges as "the Grey-Bruce charges". With respect to the Grey-Bruce charges, it is alleged that Michael Erdmann Schmidt, operating as Glencolton Farms at L44 C3, Glenelg Township, 393889 2nd Concession Rd. Durham, Ontario:

> (1) On or about the 20th day of October, 2006 did commit the offence of failing to obey the written Order of Public Health Inspector Susie McLeod dated 17 February 1994 made pursuant to section 13(1) of the Health Protection and Promotion Act, R.S.O. 1990 c. H. 7 by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the said Act.

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(2) On or about the 27th day of October 2006, at Concession Rd. 2 in the town of Durham, in Grey County, Ontario, did fail to obey the written Order of Public Health Inspector Susie McLeod dated 17 February 1994 made pursuant to s. 13(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H. 7 by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the said Act.

(3) On or about the 21st day of November, 2006, at 393889 Concession Rd. 2 in the town of Durham,
in Grey County, Ontario, did fail to obey the written Order of Public Health Inspector Susie McLeod dated 17 February 1994 made pursuant to s. 13(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H. 7 by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the said Act.

7. The remaining 16 charges which are contained in 7 Informations sworn by Brett Campbell, investigator for the Ministry of Natural Resources, are that-

(4) Michael Schmidt, on or about the 22nd day of August, 2006 at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did commit the offence of sell to Susan Atherton a milk product, to wit cheese, processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(5) Michael Schmidt, on the 22nd of August, at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did distribute to Susan Atherton and others a milk product, processed or derived from milk that **was [not]** pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended. **(Note: This count charges the defendant with having distributed a milk product that was derived from milk that "WAS pasteurized". The intention of the Informant was clearly that the defendant is alleged to have distributed the product from milk that "WAS NOT pasteurized."** I found this to be a simple typographical error, and on my own motion, pursuant to section 34(1) (a) of the Provincial Offences Act, R.S.O. c. P. 33 ("P.O.A."), I have amended this count to reflect the obvious intention of the Prosecution.)

(6) Michael Schmidt, on or about the 17th day of October, 2006 at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did commit the offence of sell to Susan Atherton a milk product, to wit cheese, processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(7) Michael Schmidt, on October 17, 2006 at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did distribute to Susan Atherton and other persons, a milk product, to wit cheese, processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(8) Michael Schmidt, on or about the 20th day of October, 2006 did commit the offence of sell to Susan Atherton a milk product, to wit cheese, processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act,

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contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(9) Michael Schmidt, on October 20, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did distribute to Susan Atherton and other persons, a milk product processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(10) Michael Schmidt, on October 20, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did sell to Susan Atherton milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(11) Michael Schmidt, on October 20, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did distribute to Susan Atherton and other persons, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(12) Michael Schmidt, on the 27th day of October, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did sell to Susan Atherton a milk product, to wit cheese, which was processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(13) Michael Schmidt, on the 27th day of October, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did distribute to Susan Atherton and other persons, a milk product, to wit cheese, which was processed or derived from milk that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(14) Michael Schmidt, on October 27, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did sell to Susan Atherton, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(15) Michael Schmidt, on October 27, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did distribute to Susan Atherton and other persons, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(16) Michael Schmidt, on or about the 7th day of November, 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did sell to Susan Atherton, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act,

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contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(17) Michael Schmidt, on 7th day of November, 2006 at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did distribute to Susan Atherton and other persons, milk or cream that was not pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(1) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended.

(18) Michael Schmidt between the 17th day of August 2006 and the 22nd day of November 2006 at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did commit the offence of Operate a plant without a licence therefor from the Director contrary to section 15(1) of the Milk Act, R.S.O. 1990, c. M. 12, as amended.

(19) Michael Schmidt, between the dates of August 17, 2006 and November 22, 2006, at L44 C3, Glenelg Twp., 393889 2nd Concession Rd. Durham, Ontario, did carry on business as a distributor of fluid milk products without a licence therefor from the Director, contrary to section 15(2) of the Milk Act R.S.O. 1990, c. M. 12, as amended.

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C. Overview

8. Michael Schmidt is the Canadian crusader for the introduction of legislation legalizing the sale and distribution of raw milk. However, the power of legislative adjustment is vested in the Legislature; it is beyond the jurisdictional authority of this court. Is it time to abolish or amend the legislation which requires the pasteurization of all milk destined for distribution and sale? Only the Legislature has the authority to answer this question, and, if deemed necessary, to act accordingly. The legislation under consideration has its roots in The Health Protection Act of 1938. The legislation continues to be an integral part of our law; its declared purpose being the health protection and safety of the people of Ontario.

9. Do all the people of Ontario still require this protection seven decades later in light of technical advances throughout the world in milk farming and agriculture? This is not my decision to make; rather it is the decision of the Legislature.

10. Is it my task to rule on the comparative health risks and hazards related to the consumption of unpasteurized milk and milk products as opposed to pasteurized milk and milk products? The answer, of course, is negative. That is not my role as the presiding justice. Is the prohibition against selling and distributing raw milk fair and just legislation? I have no authority to pronounce on this.

11. During the course of these proceedings, prior to the commencement of the trial, the defendant brought a constitutional challenge, in which he claimed that his rights under section 7 of the Charter of Rights and Freedoms had been infringed. I allowed two expert witnesses on either side of the debate as to whether unpasteurized milk is or is not safe for human consumption.

12. Two internationally renowned expert witnesses gave strong supportive evidence for each side of the debate. The defendant's experts testified that unpasteurized milk is perfectly safe and healthy. On the other hand, the Crown's expert witnesses testified that such milk is a health hazard. I am convinced that if I had allowed 22 expert witnesses on each side, the result would have been the same – a draw, as far as the court is concerned. But not only is it beyond my jurisdiction to declare a winner, it is not the determination of this issue which is the task of this court.

13. The ultimate issue for this court is to determine whether the defendant broke the law, and if so, to what extent he should be punished under the punitive segments of the legislation concerned. Essentially, this requires an extensive examination of the law, its meaning and intention in the context of all the circumstances of this case.

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D. <u>The Motion for a Consolidation Order</u>

14. The Grey-Bruce charges are with respect to offences alleged to have been committed in the township of Durham, Grey-Bruce County, Ontario. Prior to the commencement of the proceedings in this case, Crown Counsel Mr. J. Middlebro for the Grey-Bruce Health Unit, Ministry of Natural Resources, brought a motion under section 38(1) of the P.O.A. for an order of consolidation with respect to all the charges against the defendant in these proceedings. With the consent of all the parties I granted the motion.

E. <u>The Charter Challenge</u>

15. The defendant filed a constitutional challenge alleging that his Charter rights under section 7 of the Canadian Charter of Rights and Freedoms have been violated by virtue of the charges under the HPPA and the Milk Act. Section 7 of the Charter provides as follows:

> *Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

16. Prior to the commencement of these proceedings, all the parties presented a joint application to the court, requesting that I hear the trial first, and then reserve my decision until after I have heard the Charter challenge; and then deliver my judgment on the proceedings at trial before considering my decision on the Charter challenge. I granted the application. This is my judgment with respect to the proceedings at trial.

F. <u>Classification of the Charges</u>

17. Before dealing with the evidence, it is necessary to determine whether these are *mens rea*, strict liability or absolute liability offences. The seminal decision on the classification of offences in Canada is the judgment of the Supreme Court of Canada in **R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299**, in which the court concluded that there are three categories of offences, namely:

a. Mens rea offences in which the Crown must prove the actus reus as well as some positive state of mind such as intent, knowledge or recklessness;

b. Strict Liability offences in which the doing of the prohibited act, prima facie, imports the offence, leaving it up to the accused to avoid liability by establishing that he took all reasonable care; and

c. Absolute Liability offences where it is not open to the accused to exculpate himself by showing that he was free of fault.

18. Mr. Justice Dickson found that public welfare offences would, *prima facie*, be classified as strict liability offences.

19. In **Reference re: Section 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289**, Mr. Justice Lamer, as he then was, affirmed the presumption against absolute liability offences which was established in **Sault Ste. Marie**, in the following statement:

In penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends Section 7 of the Charter if, as a result, anyone is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under Section 1 [of the Charter].

20. In **R. v. Nickel City Transport (Sudbury) Limited, 82 C.C.C. (3d) 541**, Tarnopolsky, J.A. of the Ontario Court of Appeal explained Lamer, J.A.'s *dictum* as follows:

In other words, if a person faces the possibility of imprisonment or probation for the commission of an absolute liability offence, the interests in Section 7 [of the Charter], would be offended.

21. In **Nickel City** the court posed this question: *What type of legislative direction must be given before a court will be prepared to rule against the presumption of strict liability?* Madam Justice Arbour J.A., as she then was, pointed out that Section 69 of the Provincial Offences Act of Ontario authorizes imprisonment in default of payment of a fine, and that *the unfettered discretion conferred by the Provincial Offences Act upon prosecutors which opens the possibility that the sentencing judge will impose a sentence which interferes with the liberty interest protected by Section 7 of the Charter, would be enough, in my opinion, to preclude the offence being classified as one of absolute liability.* It seems clear, therefore, that the possibility of imprisonment which arises only upon default and not upon conviction is sufficient to trigger the presumption in favour of strict liability.

22. I turn now to the case at bar, and refer to the guidelines established by the Supreme Court of Canada in **Sault St. Marie** when determining whether the offences before the court are ones of *mens rea*, strict liability or absolute liability. Those guidelines are:

(a) the over-all regulatory pattern adopted by the legislature;
(b) the subject matter of the legislation;

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(c) the importance (or severity) of the penalty;
(d) the precise language used.

23. The descriptions of the offences with which the defendant is charged do not contain any language importing a positive state of mind such as intent, knowledge or recklessness. Consequently, I am satisfied that none of the offences is a *mens rea* offence.

24. The decisions of the Supreme Court of Canada in **Sault Ste. Marie** and **R. v. Chapin [1979] 2 S.C.R. 121**, stand for the proposition that public welfare offences are *prima facie* offences of strict liability, and absolute liability offences will be exceptional and will only be recognized in the face of clear legislative direction. Taking account of the guidelines of the Supreme Court, I do not find anything before me which even suggests that the presumption in favour of categorizing these offences as strict liability offences has been rebutted. Accordingly, I am satisfied that all of the nineteen offences are strict liability offences.

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G. Effect of the Strict Liability Ruling

25. Since all nineteen charges are strict liability offences, the Crown is required to prove the *actus reus* of each offence beyond a reasonable doubt. If the Crown is able to do so, then in accordance with the direction of the Supreme Court of Canada in **Sault Ste. Marie** (*supra*), in order to escape conviction, the onus devolves upon the defendant to satisfy the court, on a balance of probabilities, either that he had an honest but mistaken belief in facts which, if true, would render the acts innocent, or that he exercised all reasonable care so as to avoid committing the offences.

26. In **Levis (City) v. Tetreault, [2006] S.C.J. No. 12,** the Supreme Court of Canada explained the **Sault Ste. Marie** decision with respect to the application of *due diligence* in the following words:

> *Under the approach adopted by the Court, the accused in fact has both the opportunity to prove due diligence and the burden of doing so. An objective standard is applied under which the conduct of the accused is assessed against that of a reasonable person in similar circumstances.*

27. Alternatively, in order to avoid being convicted, the defendant must satisfy his burden, on a balance of probabilities, that an authorization, exception, exemption or qualification *prescribed by law* operates in his favour. In this regard, section 47(3) of the P.O.A., provides as follows:

> *The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.*

H. The Evidence

28. In the case at bar, there are four distinct components of the evidence, namely:

1) The Statement of Agreed Facts;
2) The Statement given by the defendant to Ministry of Natural Resources Officers at the time of the execution of the Search Warrant on November 21st 2006 ("the Search Warrant Statement");
3) The Evidence for the Prosecution; and
4) The Evidence for the Defence.

I. <u>The Statement of Agreed Facts</u>

29. A Statement of Agreed Facts, filed with the court, was signed on July 4th 2008 by the defendant as well as by the three Crown Counsel: John D. Middlebro, for Grey-Bruce Health Unit, Alan Ryan, for the Ministry of Natural Resources and Shannon Chace, for the Attorney General of Ontario, Constitutional Law Branch. The parties agreed to the following material facts:

1) The defendant is not a corporation;
2) Glencolton Farms is a sole proprietorship registered by the defendant under the Business Names Act of Ontario;
3) The business of Glencolton Farms includes, but is not limited to, the operation of a dairy farm;
4) There was no pasteurization nor sterilization of any of the dairy products at issue in this proceeding;
5) In 1994, Public Health Inspector Susie McLeod of the Bruce-Grey-Owen Sound Health Unit, as it then was, (now the Grey Bruce Health Unit) issued an Order under section 13 of the Health Protection and Promotion Act, R.S.O. 1990, H. 7, in writing, to the defendant and to Glencolton Farms, including the following terms:

I hereby require you to cease the manufacturing, processing, preparation, storage, handling, display [sale, offering for sale and distribution] of unpasteurized milk and milk products.

6) The Order of Susie McLeod was expanded by the Health Protection Appeal Board in its written decision dated 1, September 1994 to include the terms in parentheses.
7) On November 21, 2006, inspectors from the Ministry of Natural Resources and Public Health inspectors executed a search warrant at Glencolton Farms, and seized numerous items including dairy processing machinery and equipment, and 6 documents titled:

- *Changes to Glencolton Farms Policy (January 1, 2003);*
- *Notice to all milk share holders (December 31, 2002);*
- *Farm Store Price List (November 16, 2006);*

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- *Blue Bus Price List (May 29, 2006);*
- *Contact List "Shares";*
- *Summary of "Tuesday Bus Sales" and "Friday Store Sales" (May 23 to November 7, 2006).*

8) *During the execution of the search warrant on November 21, 2006, large quantities of milk and cream were found and seized, which were neither pasteurized nor sterilized, as well as cheese and other dairy products made of milk that was neither pasteurized nor sterilized.*
9) *These agreed facts would be admissible at trial subject to the outcome of the defendant's Section 8 Charter Application, and that the parties would be entitled to call further relevant evidence to supplement these Agreed Facts.*

30. On January 26, 2009 I denied the defendant's Section 8 Charter Motion, and found *that the evidence obtained pursuant to the execution of the search warrant in this case is admissible in the trial proceedings.* See: **R. v. Schmidt, [2009] O.J. No. 605.**

J. The Search Warrant Statement

31. After a lengthy *Voir Dire* I made the following Ruling:

> *Notwithstanding the oppressive behaviour of the Ministry of Natural Resources' officers, I do not find that their actions affected the voluntariness of the defendant's statement having regard to all the circumstances. Accordingly, my Ruling is that the statement given by the defendant to Officer Herries on November 26, 2006 was given voluntarily.* See: **R. v. Schmidt, [2009] O.J. No. 603.**

32. Consequently, the evidence obtained by the Prosecution pursuant to the execution of the search warrant on November 21, 2006 was admitted into evidence at the trial.

33. Prior to embarking on a detailed analysis of all the evidence, it is necessary to determine the issues which remain alive after considering the Statement of Agreed Facts and the Search Warrant Statement. This requires careful consideration of the essential elements of all the charges, the facts admitted in the Statement of Agreed Facts, and my findings of fact with respect to the Search Warrant Statement.

K. Analysis of the Charges

(a) The Charges under Section 18(1) of the HPPA

34. The 6 charges under section 18(1) of the HPPA are detailed in paragraph 7 (10), (11), (14), (15), (16) and (17). Section 18(1) of the HPPA provides as follows:

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No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a plant that is licensed under the Milk Act or in a plant outside Ontario that meets the standards for plants licensed under the Milk Act. R.S.O. 1990, c. H.7.

(b) <u>The Charges under Section 18(2) of the HPPA</u>

35. The 8 charges under the Section 18(2) of the HPPA are detailed in paragraph 7 (4), (5), (6), (7), (8), (9), (12), and (13) above. Section 18(2) provides as follows:

No person shall sell, offer for sale, deliver or distribute a milk product processed or derived from milk that has not been pasteurized or sterilized in a plant that is licensed under the Milk Act or in a plant outside Ontario that meets the standards for plants licensed under the Milk Act. R.S.O. 1990, c. H.7.

36. The prohibitions set out in sections 18(1) and (2) of the HPPA are identical save that section 18(1) relates to *milk* whereas section 18(2) relates to *milk products.*

Section1 (1) of the HPPA defines "milk" as *milk from cows, goats or sheep.*

Section 18(4) of the HPPA defines "milk product" as *a product processed or derived in whole or mainly from milk.*

(c) <u>The Grey-Bruce Charges</u>

37. These 3 charges were laid under section 100(1) of the HPPA. In order to put these charges into context it is necessary to quote section 13(1) and (2) of the HPPA in accordance with which the Order by Susie McLeod was made in 1994.

38. Section 13(1) provides as follows:

A medical officer of health or a public health inspector, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a health hazard. R.S.O. 1990, c. H.7.

39. Section 13(2) provides as follows:

A medical officer of health or a public health inspector may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,

(a) that a health hazard exists in the health unit served by him or her, and

(b) that the requirements specified in the order are necessary in order to decrease the effect of or eliminate the health hazard.

40. Section 100(1) of the HPPA provides as follows:

Any person who fails to obey an order made under this Act is guilty of an offence.

L. <u>The Essential Elements of the Charges</u>

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41. The essential elements of the charges under section 18(1) of the HPPA are that-

(a) A person

(b) Sells or offers for sale or delivers or distributes

(c) Milk or cream

(d) That has not been pasteurized or sterilized

(e) In a plant that is licenced under the Milk Act or in a plant outside Ontario that meets the standards for plants licenced under the Milk Act.

42. The essential elements of the charges under section 18(2) are identical save that section 18(2) relates to milk products as opposed to milk or cream.

43. The essential elements of the charge under section 15(1) of the Milk Act are that-

(a) A person

(b) Is operating a milk plant

(c) Without a licence from the Director (as defined in section 1) to do so.

The essential elements of the charge under section 15(2) of the Milk Act are that-

(a) A person

(b) Is carrying on business as a distributor of milk

(c) Without a licence to do so from the Director.

44. The essential elements of the Grey-Bruce charges are that-

a) Pursuant to section 13(1) and (2) of the HPPA an order was made by a Public Health inspector against the defendant;

b) The order was upheld and amended on appeal;

c) The defendant failed to obey the order, thereby committing an offence under section 100(1) of the HPPA.

M. <u>The Evidence on the Essential Elements</u>

<u>Re: Section 18 of the HPPA and section 15 of the Milk Act</u>

45. Paragraph 4 of the Statement of Agreed Facts states as follows:

> *There was no pasteurization nor sterilization of any of the dairy products at issue in this proceeding.*

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46. In paragraph 8 of the Statement of Agreed Facts the parties agree that during the execution of the search warrant large quantities of milk, cream, cheese and other dairy products which were made of milk that was neither pasteurized nor sterilized, were seized.

47. The defendant admitted in the Search Warrant Statement that he is not licenced by the Director to operate a plant or distribute milk or milk products from a milk plant.

48. With respect to all the charges under section 18 of the HPPA and section 15 of the Milk Act, it is useful to consider the following series of questions and answers set out in the Search Warrant Statement:

Q. Where do you sell or distribute your milk and milk products?

A. At the farm and in the Blue Bus, the famous Blue Bus.

Q. Where is the Blue Bus parked when you conduct your sales?

A. In a parking lot....I think it's called Richmond Hill.

Q. Do you sell your milk and milk products to the general public there?

A. I don't sell milk.

Q. What do you sell?

A. I don't sell anything except bread, meat, and cinnamon buns and brownies.

Q. Do you distribute milk and milk products to the public there?

A. I transport them to the cow share members.

Q. Who are the cow share members?

A. Cow share members are families who bought a quarter of a cow or half a cow.

Q. How much do members pay you for membership?

A. Three hundred dollars, the current average price of a cow is $1200.00 so that's what we base it on.

Q. Does a person have to be a cow share member in order to obtain milk and milk products from you?

A. Yes.

Q. What amount of money do they pay you for each litre of milk?

A. It depends where they are. In Toronto they pay $2.50. Here they pay $2.00. They pay a transport fee in Toronto.

Q. When you say 'here' do you mean sales from your store at the farm?

A. Yes. Can you correct that: it's not for sale; they pay me for the services, milking the cows, housing the cows, feeding the cows.

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Q. Are the members aware that they are obtaining unpasteurized milk and milk products from you?

A. Yes, that's why they buy it or get the cow.

Q. How many members do you have?

A. I'm not sure; probably 150.

Q. Who can obtain milk and milk products from your store?

A. Members.

Q. Why do you have the cow share program?

A. So that people can obtain raw milk.

Q. Are you aware that it is illegal in Ontario to sell or distribute milk or milk products that have not been pasteurized?

A. Oh yes totally aware.

Q. What is your understanding of how the cow share program would circumvent the milk laws?

A. It doesn't circumvent the laws; it gives the cow share holders the same right as a farmer to drink their own milk fresh from the cow they have a share in.

Q. Are you currently licenced to operate a milk plant by any level of government?

A. No.

Q. How long is a cow share member valid for?

A. Six years, which means the average milking lifetime of a cow.

49. Having no contradictory evidence nor any challenge or reason to doubt the veracity of the defendant's testimony in the Search Warrant Statement, I accept his answers therein as facts.

Section 100(1) of the HPPA

50. For ease of reference I repeat the facts set out in paragraphs 5 and 6 of the Statement of Agreed Facts:

5. In 1994, Public Health Inspector Susie McLeod of the Bruce-Grey-Owen Sound Health Unit, as it then was, (now the Grey Bruce Health Unit) issued an Order under section 13 of the Health Protection and Promotion Act, R.S.O. 1990, H. 7, in writing, to the defendant and to Glencolton Farms, including the following terms:

I hereby require you to cease the manufacturing, processing, preparation, storage, handling, display [sale, offering for sale and distribution] of unpasteurized milk and milk products.

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6. The Order of Susie McLeod was expanded by the Health Protection Appeal Board in its written decision dated 1, September 1994 to include the terms in parentheses.

51. It follows that the only live issue on these three charges is whether the defendant breached the Order as alleged, and is therefore *guilty of an offence.*

N. <u>The *Viva Voce* Evidence for the Prosecution</u>

52. In light of the factual admissions in the Statement of Agreed Facts and my findings of fact in relation to the Search Warrant Statement, I do not believe that it is necessary to elaborate unduly on the *viva voce* evidence of the Prosecution's witnesses.

53. Suffice it to say that there is sufficient compelling evidence before me that the Ministry of Natural Resources appointed two undercover inspectors to investigate the activities of the defendant with respect to information received that he was selling unpasteurized milk and milk products from his farm in Durham, Ontario, and from a bus in which he transported his products to the Greater Toronto Area.

54. Susan Atherton testified that at all material times in 2006 she was employed by the Ministry of Natural Resources as a conservation officer, and worked as an undercover agricultural investigator using the name "Susan Taylor". At that time Ms. Atherton was working together with Victor Miller who testified that he was then, and still is now, an investigator with the Intelligence Investigator Services Unit of the Ministry of Natural Resources. At all material times Mr. Miller was working in an undercover capacity using the name "Victor Douglas".

55. On several occasions during the periods under consideration the investigators attended both the bus and the farm store, where they purchased various items. Susan Atherton testified that *the intention was to buy milk and it wasn't until later that we found out that you had to be a member.* Ms. Atherton told the Court that although she attempted to purchase milk from the defendant, she was not permitted to do so until she became a member of his Cow Share Program for which she eventually paid $300.00.

56. During the course of the Prosecution's evidence, in an effort to curtail the proceedings by eliminating irrelevant, unnecessary and superfluous testimony, I addressed the defendant in the following words:

It seems to me, correct me if I am wrong, that there is no argument that you operate a farm in the area which has been described several times, [from which] you sell all kinds of fresh produce and baked and cooked [products] and what have you there, from a store.. amongst the buildings; that you also operate a blue bus in which you pack [your products] from time to time, and on Tuesdays or other days...you drive it to a certain location in the Greater Toronto Area, maybe Vaughan or Richmond Hill, whatever it is, and there you provide-you offer for sale all kinds of produce or what have you, except that milk and milk products are required to be

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provided for a fee only to people who are registered cow shareholders. Is that correct or am I wrong?

The defendant's reply was: *That's correct*.

57. Consequently, I am of the view that the only live issue before me with respect to the charges under section18 of the HPPA and section 15 of the Milk Act, is the following:

"Is the defendant guilty of the offences with which he is charged or does the fact that he sells his milk and milk products only to paid-up members of his Cow Share Program exculpate him"?

O. The *Viva Voce* Evidence for the Defence

Mr. Eric Bryant

58. Mr. Eric Bryant testified that he is a cow share member, who drives from his home in rural Ontario to the defendant's farm every two weeks to obtain a supply of milk and milk products. It is about a six-hour drive both ways.

59. Mr. Bryant told the court that *back about 12 years ago I was having some health issues with poor digestion...I have a B.Sc. in biology, so my natural reaction was to start researching about health and see why I was having indigestion...* He secured literature *on raw diet and the importance of enzymes, and it had a quote there about not cooking your food, and it attributed it to Jesus, and that caught my interest, and I followed up the reference...* He and his wife were influenced by the "Ascene Gospel of Peace" which they acquired; they became vegetarians, and after extensive enquiries, they became cow share members of Glencolton Farms, and have continued to obtain their milk products in that capacity for some 12 years.

60. Mr. Bryant further testified that he did his own research about the benefits and potential risks of raw milk, and that he is *an informed consumer.* He has a contract with the defendant in terms of which *I'm part-owner of a cow, and Michael looks after those cows. I come out and get milk from him, and I give him money to pay for the upkeep and maintenance of the cows.*

Mr. Michael Schmidt: Evidence-in-Chief

61. Mr. Michael Schmidt testified in his own defence, after being cautioned by the court that he had the right not to do so. In summary, his evidence is as follows:

a) He was born in Germany in 1954, grew up and worked on farms throughout his life.
b) In 1978 he received a Masters degree in Agriculture after completing his thesis in bio-dynamic farming, the earliest form of organic agriculture.

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c) He immigrated to Canada in 1983, where he established a dairy farm, and worked within the quota system.
d) He continued to receive calls from people with food allergies, who were apparently unable to tolerate pasteurized milk.
e) As a result, he cancelled his contract with the Milk Marketing Board, and gradually developed the concept of establishing a form of joint ownership of his cows with those who were asking for unpasteurized milk products.
f) His “lease-a-cow” program enabled him to retain ownership of his cows, while they were leased to the people who wanted the unpasteurized milk and milk products.
g) During the two years that this program was in effect *there was no illness reported from the consumption of the raw milk provided.*
h) In February 1994, Susie McLeod, an inspector employed by the Grey-Bruce Health Unit issued an order under the HPPA that he refrain from this practice because the milk was deemed to be a health hazard.
i) Also in 1994, his farm was raided by Ministry officials, who confiscated and destroyed hundreds of pounds of butter and cheese and hundreds of litres of milk in front of his five young children, who were being raised on those products.
j) *One of my workers was abducted and threatened by unknown people; our farm was broken into, milk equipment intentionally destroyed, and cows poisoned.*
k) In September 1994, the week before his trial, his farm insurance was cancelled without warning, which left him without any protection.
l) In all of those circumstances, on the advice of his lawyer, he pleaded guilty at trial. He paid the fine of $3,500.00 and was placed on probation for 2 years.
m) His appeal to the Health Protection Appeal Board was denied.
n) As a result of the costs of those proceedings, he lost 500 acres of his 600 acre farm, almost all of his machinery and almost all of his cows. He was on the verge of bankruptcy.
o) He then made written proposals to the Milk Marketing Board as well as to the Ministry of Natural Resources and the Ministry of Agriculture and Farming in an effort to develop a system for providing raw milk and milk products to those members of the community who wanted and/or needed them. All proposals were unsuccessful.
p) Consequently, in order to meet the needs of those who wanted the raw milk products, *I developed the cow share program...This time the cows were owned by the cow share people. I also looked at the definition of*

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a 'milk plant', and developed the new system in a way that we would not fall under the definition of a plant according to the Milk Act. We simply had an expanded milk house directly attached to the barn.

q) *My concern was not to circumvent the law. My concern was simply to work within the parameters of the statutes and Acts, as they were applying to farms under contract with the DFO, or farms which sold products to the public. None of that was happening in our case. We had a private contractual agreement with our cow share owners. We did not advertise.*

r) He talked openly about the concept of the cow share program, and gave lectures at universities and to chefs about the importance of the connection between the farmer and the consumer.

s) He thought that he had finally found a way to provide the raw milk products within the law.

t) After many years of hard work and fund raising, he was virtually able to recover from the losses which he had encountered in 1994.

u) Since 1996 –

- He has been bringing his milk products to the cow share owners in the Greater Toronto Area;
- His cow share owners have increased from 10 to 150;
- He publishes regular newsletters to keep the cow share members informed;
- Every cow share member has a membership card, and is fully aware *that they receive their milk raw;*
- *No one can receive milk or milk products unless they are members;*
- If someone wishes to become a member, he tries to establish that the person is serious, and gives him/her *something to try* in advance;
- He does not sell raw milk to the public;
- He provides a service for the members; this includes feeding, cleaning and housing the cows, bottling, cooling, milk separating and cheese making;
- The members have access to the cows' health records and milk test results;
- He retains 2 milk samples from every production for 4 weeks for *back-up testing;*
- An independent dairy inspector inspects his entire operation annually;
- His licenced veterinarian frequently tests his herd as well as the cow manure for pathogens; monthly *baseline testing* of the milk is conducted;
- No human pathogens have ever been found in any of his milk products;
- He has never received any reported illness due to the consumption of any of his milk products;

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- He maintains an up-to-date record of all cow share members together with their contact information.
- On the fridge where the milk is stored at the farm store, there is a sign stating: **"Members Only"** and this was confirmed by Susan Atherton in her testimony.

62. At the conclusion of his evidence-in-chief, Mr. Schmidt asked whether I would permit him to submit a large number of affidavits from numerous cow share members. The Crowns objected. I indicated that without the Crown's ability to cross-examine the affiants, the evidence would be hearsay and inadmissible. However, on consent, I ruled that the affidavits would not be admitted into evidence, but that I would note that the defendant was in possession of those affidavits, and that they were all supportive of his case.

Cross examination of Michael Schmidt by Mr. Ryan

63. When questioned about the cow share members' handbook, the defendant testified that the contractual arrangement between him and the members was governed by the handbook, the membership card and a personal, verbal agreement between him and them.

64. When asked how the cow share program constituted an exemption to his obligation to comply with the relevant legislation, he replied as follows:

> *There's no exemption. It is simply a concept of a private contract between two people to attain rightfully a product which is not available normally to the public.*

65. Both Mr. Ryan and the defendant were in agreement that there is no law which prohibits anyone from consuming raw milk and milk products, and I am not aware of any such legislation in the Province of Ontario.

66. Under cross-examination with respect to the charge of selling cheese to the undercover officer, Susan Atherton (Taylor), he told the court that ...*she explained to me why she needed the raw dairy. She said that she had to have surgery and she wanted to build up her immune system before the surgery.* He explained the details of the cow share contractual agreement, and told her that she would have to go to his farm in order to become a member. He told one of his farm employees, Beverley Viljakainen, that Susan Atherton would be coming to the farm for that purpose. Mr. Schmidt testified that she had only been given a sample of his cheese to *try out if the milk products agree with her*, and she was *never asked for money specifically for the reason that she was not a member yet*, and this was consistent with his usual practise. He conceded that Susan

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Atherton may have also acquired a small quantity of cheese at the farm on another occasion when she went to become a member, but he was emphatic that she was not actually charged for the cheese.

67. The defendant testified that in order to ensure that every prospective member understood that consumption of the defendant's dairy products is a private, personal, conscious decision which he/she makes, the front cover of the cow share handbook contains the following statement:

> *This booklet is intended solely for informational purposes. You consume raw dairy products at your own risk.*

Cross examination by Mr. Middlebro

68. Mr. Schmidt acknowledged that on October 20th, 27th and November 21st 2006 raw milk and milk products were stored and displayed on his farm and on the blue bus.

69. He again acknowledged the validity of both the February 17th 1994 Order by Health Inspector Susie McLeod and the Order dated September 1st 1994 by the Health Protection Appeal Board as he had done in the Statement of Agreed Facts.

70. When asked why he thought he was exempt from complying with the Orders, Mr. Schmidt replied that he was not exempt; *it doesn't apply to me; as simple as that.* In response to Mr. Middlebro's question, he said: *I comply with the order[s], yes.*

Credibility Issue

71. There is conflicting evidence with respect to the acquisition by Susan Atherton (Taylor) of a small package of cheese marked $3.20 on two separate occasions before she became a cow share member. Her evidence is that on each such occasion, although she was not permitted to purchase milk, she did purchase a small package of cheese while she was not yet a cow share member.

72. Under cross-examination by Crown Counsel Ryan, the defendant testified that in accordance with his usual practice, he had given Ms. Atherton the cheese *to try out if the milk products agree with her* and that *she was never asked for money specifically for the reason that she was not a member yet.*

73. In Susan Atherton's testimony she told the Court that when she first went to purchase raw milk at the Blue Bus -

There was a little book on the shelf beside the cheese and I picked it up, and I was looking at it, and I set it down on the counter when I purchased my cheese and it was

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called: "Cow Share Members Handbook" *and after I paid for my cheese, Mr. Schmidt gave me the book.*

74. Their respective testimony is consistent insofar as his having given her the handbook at that time, and telling her that she would have to attend the farm store and apply for membership there. The issue is whether she paid for the cheese before becoming a member or whether the defendant or his employee gave the cheese to her to try after she had told the defendant that she wanted to buy the raw milk because she was going to have surgery.

75. With respect to the resolution of this issue, I rely on the third element of the test for determining credibility as set out by the Supreme Court of Canada in **R. v. W.D., [1991] 1 S.C.R. 742 (S.C.C.).** After hearing all the evidence in relation to this issue, I am left with a reasonable doubt as to whether the defendant sold the cheese or gave it to Susan Atherton. Accordingly, I resolve the issue in favour of the defendant, and find that he did not sell the cheese to Susan Atherton, but gave it to her for the reasons which he supplied to the Court.
In my view, it strains common sense that the defendant would sabotage his entire cow share program by selling small quantities of cheese for a total of $6.40 to someone who was not a member.

76. In the decision of the Health Protection Appeal Board of 1st September 1994, it is noteworthy that although the Appeal Board ruled against him, the Board made the following comments with respect to Mr. Schmidt at page 15:

> *The Board accepted Mr. Schmidt as an expert witness qualified to express opinions in relation to farming and food production. The Board furthermore found Mr. Schmidt to be a candid, honest and knowledgeable witness, and attached great weight to his testimony throughout the hearing.*

77. Save that I did not qualify the defendant as an expert witness in the proceedings before me, I am in complete agreement with the above statement of the Appeal Board, and apply it *mutatis mutandis* to his testimony in the proceedings before this Court.

P. <u>The Issues</u>

78. Having regard to the Statement of Agreed Facts and my findings of fact with respect to the Search Warrant Statement, it is my view that the ultimate issues to be determined by the court are as follows:

a) In relation to the charges under section 100(1) of the HPPA, did the actions of the defendant constitute breaches of the Order, thereby committing the offences as alleged?

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b) In relation to the charges under section 18(1) and (2) of the HPPA, did the actions of the defendant constitute selling, offering for sale, delivering or distributing milk and milk products within the contextual meaning of the legislation, thereby committing the offences?

c) In relation to the charges under section 15(1) and (2) of the Milk Act, did the actions of the defendant amount to operating a plant and carrying on business as a distributor of milk and milk products within the contextual meaning of the legislation, thereby committing the offences?

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Q. <u>Statutory Interpretation</u>

79. To resolve the issues which I have described requires an in-depth investigative examination of the complexities of statutory interpretation. In a nutshell, the Prosecution argues that the prohibitions in the legislation govern all members of the public. The defendant, on the other hand, proffers that such prohibitive legislation does not apply to a specific group of people who are members of a select program, namely the Cow Share Program created by the defendant.

80. My opinion is that the issues do not seem to involve an attack on the legislation *per se*, but rather a difference of opinion as to the extent of the applicability of the legislation to the defendant as he now operates his dairy product business, so that the resolution of the issues is fact specific.

81. If the interpretation of legislation was such a simple task, why have so many books been written on the subject? In Canada, the leading textbook on Statutory Interpretation is **"Driedger on the Construction of Statutes"** of which there were three editions. The fourth edition is entitled: **"Sullivan and Driedger on the Construction of Statutes"**, Butterworths Canada Ltd., 2002 ("4th Edition"), and in 2008, the fifth edition was published, entitled **"Sullivan on the Construction of Statutes"**, LexisNexis Canada Inc., 2008 ("5th Edition").

82. In her Foreword to the 4th Edition, Professor Sullivan writes as follows:

The third edition of 'Driedger on the Construction of Statutes' was not just a revision of Driedger's work but a new book in many respects. First, the focus shifted from British precedent to the current practice of Canada's appellate courts, and from an intentionalist to a pragmatic approach. Second, issues not dealt with or given only a cursory treatment in the early editions received a full analysis in the third.

83. *The modern principle of interpretation of statutes is the culmination of centuries of interpretation by common law courts.* (4th Edition at page 4). It is apparent, therefore, that statutory interpretation is an evolutionary process. The methods of interpretation change with the shifts in jurisprudence so that, as time goes on, statutory interpretation requires reliance on new and ever-changing circumstances, ideas and methods concomitant with

societal and technological development, discoveries and inventions. Even the initial purpose of the legislators may change to meet the new challenges of a different generation.

84. *In examining social context, the courts look both to the context in which the impugned legislation was originally enacted and, in dynamic legislation at least, to the context in which it operates.* (5th Edition at page 562).

85. *By social context Driedger meant the general and fluctuating circumstances of society; by intellectual context he meant the individual knowledge that each of us acquires through education and experience. In short 'all facts that are needed to understand the subject matter of a statute may be considered by a court'.* (5th Edition at page 562).

86. Indeed, the Interpretation Act of Canada states in section 10:

> *The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning. R.S., c. I-23, s. 10.*

87. Furthermore, in section 12 of the Interpretation Act Parliament directed that-

> *Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. R.S.C. 1985, c. I-2, s. 12*

88. In addition, section 64(1) of the Ontario Legislation Act, which replaced the Ontario Interpretation Act, mirrors the Federal Act as follows:

> *An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Schedule F, s. 64 (1).*

89. In Black's Law Dictionary, Seventh Edition, the word "remedial" in relation to a remedial statute is defined as "intended to correct, remove, or lessen a wrong, fault, or defect".

90. In **R. v, Jacob, [2009] O.J. No. 303**, a judgment released on January 27th 2009, the Ontario Court of Appeal was considering the interpretation of legislation prohibiting hunting at night in a certain area. The Appellant was appealing his conviction for discharging a firearm across a road in a First Nations area. At paragraph 35, the Court of Appeal said:

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The well established approach to statutory interpretation is set out by the Supreme Court of Canada in **Bell Express *Vu Limited Partnership v. Rex, [2002] 2 S.C.R. 559,*** at paragraph 26, as follows***:***

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, and the intention of Parliament.

91. And at paragraph 36 of **Jacob**, the Court noted-

This approach to statutory interpretation- sometimes referred to as the textual, contextual and purposive approach-requires an examination of the three factors: The language of the provision, the context in which the language is used, and the purpose of the legislation or the statutory scheme in which the language is found.

92. The Court of Appeal found that since one of the purposes of the legislation in question was public safety, *the context and more importantly its purpose point strongly to a broader interpretation.…*

93. According to Professor Sullivan, section 12 of the Interpretation Act *was introduced at a time when legislation was normally drafted in precise and very detailed terms. For such legislation, it makes sense for interpretation to be both purposeful and liberal. However, for legislation drafted in general terms, a purposeful interpretation often requires a restrictive interpretation-one in which the scope of the general language is narrowed so as to exclude applications that are outside the purpose.* (5th Edition at page 469).

94. My view is that the sections in issue under the HPPA and the Milk Act constitute legislation which is drafted in general terms so that the court must adopt a *restrictive interpretation-one in which the scope of the general language is narrowed so as to exclude applications that are outside the purpose* [whether actually intended or more appropriate in the circumstances]. Such an interpretation takes into account not only the context in which the legislation was originally enacted, but also the context in which it currently operates.

95. The question before me may be simply expressed as follows: "If the purpose of the HPPA and the Milk Act is primarily public safety, does the legislation apply to a structured group of private people, such as the members of the defendant's cow-share program, who may wish to become involved in activity which in itself is not unlawful, so that public protection of such people is not required, and therefore the legislation concerned is not applicable to them?"

96. If I were to adopt the ordinary meaning of the various pieces of legislation under consideration, at first blush it would appear that the defendant should be found guilty on all counts. However, I believe that in all the circumstances, including the history of this case and the defendant's many years of involvement with the justice system in relation to

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his dairy products, a thorough contextual analysis would be in keeping with the proper administration of justice. *Today, as the modern principle indicates, intention, textual meaning, and acceptability of consequences are all legitimate concerns of interpreters; each has a role to play in every interpretive effort.* (4th Edition at page 7**).**

97. When the Court considers the overall objective of the Legislature in enacting both the HPPA and the Milk Act, what is essentially in contention in this case is the breadth of the specific objectives of the Legislature.

98. In the 4th Edition at page 20, the learned authors state: *As understood and applied by modern courts the ordinary meaning rule consists of the following propositions:*

1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.

2. Even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation: they must consider the entire context.

3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

99. And at pages 2 and 3, the learned authors explain the concept in subparagraph 3 above in the following manner:

In an easy case textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague or obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has weakness, it is its failure to acknowledge and address the dilemma created by hard cases.

100. I am of the view that the case at bar is indeed one of those hard cases contemplated by Driedger and Sutherland, so that the court must adopt a dynamic approach to interpreting the legislation in question, interpretation which may necessarily modify or depart from the ordinary meaning. *In practice, at least in hard cases, courts are required to balance a number of competing considerations in accordance with their sense of what is appropriate in the circumstances.* (4th Edition at page 7).The court is required to *look both to the context in which the impugned legislation was originally enacted and, in dynamic legislation at least, to the context in which it operates."*(5th Edition at page 562).

101. In the 5th Edition at page 573, Professor Sullivan makes the following comment on the issue of broad interpretation:

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In modern interpretative practice, courts have become accustomed to reading legislative texts in a broad context. Increasingly, this context includes extrinsic aids that formerly were considered inadmissible-legislative evolution and legislative history are relied on as both direct and indirect evidence of legislative intent. In the words of Sullivan and Driedger, 4th edition at page 20: *Interpreters [of legislation] are obliged to consider the total context of the words in every case, no matter how plain those words may seem on initial reading".* (Underlining for emphasis).

102. *Statutory interpretation is founded on the assumption that legislatures are rational agents. They enact legislation to achieve a particular mix of purposes, and each provision in the Act or regulation contributes to realizing those purposes in a specific way.* (4th Edition at pages 243-244).

103. *Reading down should be used as an interpretative technique when the evidence shows on balance that narrowing the scope of the text is the best way to give effect to the apparent intentions of the legislature.* (Sullivan 5th Edition at page 466).

104. In **Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co., [2008] O.J. No.409 (O.S.C.)** the court was considering the application of certain provisions of the Ontario 407 Act to trailers. In narrowing the scope of the 407 Act to exclude its applicability to attached trailers, the court held that the Ontario Legislature passed the 407 Act *as a component part of the much broader statutory scheme enacted under the Highway Traffic Act to govern the use, management and administration of highways and vehicles using highways in Ontario.*

R. The Validity of the Ontario Milk Legislation

105. In **Allan v. Ontario (Attorney General), [2005] O.J. No. 3083 (O.S.C.)** the Ontario Divisional Court was dealing with a case involving the validity of the Ontario provincial milk producing and marketing legislation in relation to the export of Ontario milk from the province. The court held that the applicants could not avoid the application of the provincial marketing legislation by exporting their product. The court found that regardless of the ultimate destination of the milk they produced, they were subject to the valid provincial regulatory scheme.

106. In **Allan**, after a detailed examination of the legislation, the court held that Ontario's milk marketing program was validly enacted. In order to properly understand the context in which the charges before this court were laid, it is beneficial to quote the relevant passages of the court in **Allan.**

> 11. *The objectives of the provincial Act are carried out by the Ontario Farm Products Marketing Commission ("OFPMC") and the Dairy Farmers of Ontario. The OFPMC is a body appointed by the Lieutenant-Governor in Council, which is empowered to make regulations with respect to the production and marketing of milk in Ontario (s. 7(1) of the Milk Act). It is also authorized to delegate its power to make regulations to a marketing board like DFO, including regulations requiring that milk*

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be marketed by, from or through the marketing board (ss. 7(8) and 7(1)[35])).
The provincial Act also permits the OFPMC to authorize a marketing board to exercise certain powers, including the power to require that milk be marketed on a quota basis (s. 7(1)[14]). Where the marketing board is authorized to exercise such powers, it may make regulations, orders, policies and decisions or issue directions (s. 7(9)).

12. *DFO has been delegated the power to make regulations with respect to the production and marketing of milk within Ontario, and to exempt any persons from the requirements set out in those regulations (s. 5 of O. Reg. 354/95, Milk and Farm-Separated Cream - Marketing; see also s. 7(1) of the provincial Milk Act, particularly subsections 7(1) [11] and 7(1)[35-37]). The application of the regulation is set out in s. 2:*
This Regulation provides for the control and regulation in any or all respects of the producing or marketing within Ontario of milk and farm-separated cream, including the prohibition of that producing or marketing in whole or in part.

DFO has been authorized to require that milk be marketed on a quota basis and to regulate the fixing and allotment of quota (s. 6 of O. Reg. 354/95, and s. 7(1) of the provincial Milk Act, particularly s. 7(1)[14-16]).

13. *DFO has made the regulation in issue in this case, DFO Milk General Regulation 11/04 pursuant to the powers granted to it. Again, s. 2 deals with the application of the regulation:*

This Regulation provides for the control and regulation in any or all respects of

(a) *the producing and marketing within Ontario of milk, including the prohibition of that producing or marketing in whole or in part, and*
(b) *the quality of milk in Ontario.*

The regulation requires that all milk producers be licensed by it, and that all milk produced meet Grade A standards. DFO also requires that all milk be marketed to it (s. 3) and that all milk be marketed on a quota basis (s. 7). Appointed transfer agents of DFO receive milk from the bulk milk tanks of licensed producers and arrange for its transportation as part of the fungible milk supply to milk processors. Licensed milk producers are allotted a marketing quota calculated on a kilogram of butterfat basis. Quota represents the right to sell milk, whether it is ultimately to be used intraprovincially or for interprovincial or export trade, to the provincial marketing board. DFO sells the raw milk to dairy processors for further processing, either for consumer use in liquid form ("fluid milk") or for use in dairy products like cheese or ice cream ("industrial milk").

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S. **Penalty Considerations**

107. In my opinion, when considering the meaning in relation to the ultimate objectives of all the legislation under which the defendant has been charged, it is prudent also to take into account the penal consequences of conviction. This task requires a consideration of whether the consequences of conviction are acceptable, and therefore, legitimate. Mr. Schmidt is facing 17 charges under the HPPA. Section 101(1) of that Act provides as follows:

Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than $5000.00 for every day or part of a day on which the offence occurs or continues.

108. He is also facing two charges under the Milk Act. Section 21 provides as follows:

Every person who contravenes this Act or the regulations, or any plan or any order or direction of the Commission, the Director or any marketing board, or any agreement or award or renegotiated agreement or award declared to be in force by the Commission, or any by-law under this Act, is guilty of an offence and on conviction is liable for a first offence to a fine of not more than $2,000 for each day that the offence continues and for a subsequent offence to a fine of not more than $10,000 for each day that the offence continues. R.S.O. 1990, c. M.12, s. 21.

109. Because there is no definition of "subsequent offence" in the Milk Act, I accept that the ordinary meaning of the term is what is intended. Therefore, I understand the term "subsequent offence" to mean any conviction of a similar offence to the ones of which a defendant was previously convicted. On September 13th 1994 Mr. Schmidt was convicted, *inter alia*, of offences under section 15(1) and (2) of the Milk Act. It follows that upon conviction of the two current charges under the Milk Act, he would be liable to a fine not exceeding $10,000.00 for each conviction times the number of days that each offence is held to have continued.

110. I do not intend to do the math. However, it is clear that the totality of the potential fines would be astronomical. As such, when I consider these penal consequences in conjunction with the remainder of my findings herein, I cannot accept that the Legislature ever intended that a person who is not putting the general public at risk, and who is functioning to all intents and purposes within the parameters of the law, should face such enormous punishment.

T.The Purpose of the Milk Act

111. The purpose of the Milk Act as set out in section 2 is:

a. to stimulate, increase and improve the producing of milk within Ontario;

b. to provide for the control and regulation in any or all respects of the producing or marketing within Ontario of milk, cream or cheese, or any combination thereof, including the prohibition of such producing or marketing in whole or in part; and

c. to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario.

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112. An analysis of the overall purpose of the Milk Act is necessary in order to understand the purpose of the Act as well as the scheme established by the Act for achieving that purpose.

The Milk Act R.S.O. 1990, c. M. 12

113. Adopting the ordinary meaning of the words in section 2, the overall purpose of the Act
is to stimulate and improve, to control and to regulate the production and quality of milk and milk products in Ontario. In order to give effect to such purpose, the Act provides, *inter alia:*

- Administration and Enforcement procedures;
- For the establishment of a Commission called the *"Ontario Farm Products Marketing Commission"* with powers to inspect and in numerous ways to regulate the producers and the production of such products;
- For the construction and control of production plants;
- For the licensing with respect to such plants;
- A description of offences under the Act;
- Procedures for compliance enforcement; and
- Punishment for those found guilty of committing defined offences under the Act.

114. Succinctly put, the scheme of the Act essentially embodies a process for the control of the production and marketing of milk and milk products in the Province of Ontario. In relation to the prosecution of people who are alleged to have contravened any of the provisions of the Act, I refer to section 25 of the Milk Act, which states under the heading "Rebuttable Presumption" as follows:

> *In any prosecution for an offence under this Act, the act or omission of an act, in respect of which the prosecution was instituted, shall be deemed to relate to the marketing within Ontario of milk, cream or cheese, or any combination thereof, unless the contrary is proven"*. (Underlining for emphasis).

115. I find that the presumption in section 25 clearly places the onus on the defendant in this case to rebut that presumption by proving to the court, on a balance of probabilities, that the cow share program as it was established and is being run by him, does not constitute "marketing within Ontario" as set out in section 25.

116. Section 1 of the Milk Act defines "marketing" as follows:

> "Marketing" *includes advertising, assembling, buying, distributing, financing, offering for sale, packing, processing, selling, shipping, storing and transporting and 'market' and marketed' have corresponding meanings; (commercialisation", "commercialiser", "commercialisé").*

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117. Professor Sullivan (5th Edition at page 45) says the following in regard to the ordinary meaning rule:

> *The presumption in favour of ordinary meaning is rebutted by evidence that another meaning was intended or is more appropriate in the circumstances.* (Underlining for emphasis).

118. And at page 227, the learned author writes:

> *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.*

119. I find that the defendant has indeed rebutted the presumption set out in section 25 of the Milk Act for the following reasons:

a) The stated purposes of the Act envisage the control of milk production for marketing and commercial purposes in Ontario, but *Purpose is not inherently more important than other contextual factors, and cannot be relied on to justify adopting an implausible interpretation;* (4th Edition at page 261)

b) The specific inclusion at the end of the definition of "marketing" of "commercialisation", "commercialiser", "commercialisé" makes it plain and obvious that commercial marketing in its broadest sense is what is meant by the term "marketing"*;*

c) Utilizing the Latin interpretive guide: *inclusio unius est exclusio alterius* it seems apparent that the specific inclusion of those terms in the definition was to clarify that the term "marketing" as used by the Legislature means commercial marketing within the general public, and excludes a small group of people who have come together by private agreement, such as the cow share program established by the defendant, for the purpose of obtaining raw milk products from him, by buying shared ownership in his cows for the duration of the milking life of the cows;

d) Marketing implies advertising and offering products for sale to the general public, who are required simply to pay the requested price for the products; the undisputed evidence of the defendant is that there is no advertising or selling of his products to the general public whatsoever, and that in both the farm store and the blue bus where his milk is stored, there are clearly visible signs indicating: **"Members Only".**

e) The definitions of the words "distributor" and "plant" in section 1 of the Act are:

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"Distributor" *means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers.*

"Plant" *means a cream transfer station or milk transfer station or premises in which milk or cream or milk products are processed.*

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120. As indicated earlier, I found that the defendant did not sell cheese to Susan Atherton prior to her becoming a member of the cow share program. My conclusion with respect to the actions of the defendant in relation to the two charges under the Milk Act is that the broad, general meaning of the legislation must be adopted, and that this requires a remedial interpretation of the legislation as mandated under section 12 of the Interpretation Act of Canada and section 64(1) of the Ontario Legislation Act.

121. Thus my interpretation is that the legislation refers to the public at large, and does not include the defendant's dairy operation as it is currently being conducted, where sales of the defendant's dairy products are absolutely restricted to members of his cow share program. In my view, such a remedial interpretation gives effect to the legislative meaning in accord with the overall contextual purpose of the Milk Act, and accordingly, "best ensures the attainment of its objects" (R.S.C., 1985, c. I-2, s. 12) and "effect is given to the enactment according to its true spirit, intent and meaning" (R.S., c. I-23, s. 10).

122. Furthermore, notwithstanding the broad definitions of "plant" and "distributor", I find that in all the circumstances, taking into account the structuring and conduct of his entire dairy operation, the defendant did not require a licence from the Director to operate his dairy product enterprise as he does, nor did he by so doing, carry on business as a distributor of fluid milk products without a licence. Consequently, I am not persuaded that the Crown has proven the *actus reus* of these two charges under sections 15(1) and (2) of the Milk Act beyond a reasonable doubt. Accordingly, I find the defendant not guilty.

U. The Purpose of the HPPA

The Charges under section 18(1) and (2) of the HPPA

123. An analysis of the overall purpose of the HPPA is necessary in order to understand the purpose of the Act as well as the scheme established by the Act for achieving that purpose. The legislation creating the prohibition against the sale of unpasteurized milk first came into force in the year 1938 in section 100(1) of The Public Health Act R.S.O. 1938 c. 30. Section 18(1) and (2) as well as section 13(1) and (2) of the current Act are located under Part III of the HPPA which is headed "Community Health Protection".

124. The purpose of the HPPA is set out in section 2 as follows:

a. to provide for the organization and delivery of public health programs and services,
b. the prevention of the spread of disease, and

c. the promotion and protection of the health of the people of Ontario.

125. Adopting the ordinary meaning of the words in section 2, my understanding of the overall purpose of the Act is that it is essentially related to the provision of *public health programs and services* so as to *prevent the spread of disease* amongst the people of Ontario, and to promote and protect *the health of the people of Ontario*.

126. Of particular significance are the terms: "public" and "people of Ontario". These terms must surely be understood contextually as relating to the public at large, so that the intrinsic aim of this legislation is the protection of the public at large. Supportive of this view is that section 18 is under Part III of the Act which is titled: "Community Health Protection". Does this legislation then also govern those members of the public who do not believe that they require such protection? Did the defendant break the law by doing what he did?

127. In other words, are the cow share members bound to accept the protection offered to the general public in the legislation or are they permitted to reject the protection offered, and assume any risks which may be involved? The starting point, I believe, is to understand the meaning of the word "public" and the term "people of Ontario" as they are used in the legislation, in an effort to interpret the wording of the sections within the context of their stated purpose.

128. It is noteworthy that the first definition of the word "public" in the "Concise Oxford Dictionary, 1990 is "of or concerning <u>the people as a whole</u>". (Underlining for emphasis)

129. Let me consider some of the pertinent jurisprudence with respect to the meaning of the word "public". In an old British case, **Sherwell v. Combined Incandescent Mantles Syndicate Ltd., (1907) 23 TLR 482 (United Kingdom Court)** the court was considering the meaning of the term "an offer of shares to the public." At page 483 the court said per Warrington J.: "It means, in my judgment, an offer of shares to anyone who should choose to come in".

130. In **Toronto (City) v. Original Playhouse Cafe Ltd., [2005] O.J. No. 1721 (O.C.J.),** His Worship R. Quon, was considering the meaning of the term "public" in relation to charges laid under the no-smoking by-law of the City of Toronto. At paragraph 76, the learned Justice of the Peace said the following:

...in broad terms, when an invitation is addressed or is aimed at the public in general, with no restriction as to who can attend, then all members of the public have that expressed or implied right of access. On the other hand, when invitations are limited or given to specific persons ...then those invitations would not be made to the public in

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general. Hence, depending on the context, the type of event, the type of premises, and where the public is not ordinarily invited or permitted access to an event, then the function is normally a private function and the premises are not a public place for the purposes of the no-smoking by-law

131. In **Kipling Avenue Social Club v. Toronto (City), [2005] O.J. No. 1323 (O.S.C.)** the Appellant applied for a declaration that it was a private club for the purposes of the Toronto Municipal Code which prohibited tobacco smoking in public places. The purpose of the application was to enable club members to smoke in the premises of the club. In dismissing the application, Echlin J. of the Ontario Superior Court held that the Appellant was not a private club, *inter alia*, because the business and membership cards and the website made no reference to the club whatsoever. At paragraph 17, the Court said the following:

> *To be a* "private club" *under the Code, the Club must operate solely for the benefit and pleasure of its members and direct its publicity and advertisements to its members. In this regard, there was extensive evidence presented that publicity and advertisements were directed to the public at large, leading to the suggestion that the Club was not operating solely for the benefit of its members.*

132. In **R. v. 1100947 Ontario Inc. o/a Kilt and Clover, [2008] O.J. No. 783,** the Ontario Superior Court was considering the Crown's appeal in relation to the dismissal of charges under the Smoke-Free Ontario Act. The Appellant submitted that the main objectives of the Act are to limit public and workplace exposure to second-hand smoke. In determining the objectives of the legislation the court referred to the Hansard Report at the time that the legislation was introduced. The Honourable George Smitherman, Minister of Health, as he then was, stated as follows in the Legislature:

> *....This bill creating the Smoke-Free Ontario Act, would, if passed, protect all Ontarians from the deadly effects of cigarette smoke...no matter where they are.*

133. The Minister then explained the ultimate purpose of the legislation in the following words:

> *In other words, <u>unless Ontarians want to be exposed to cigarette smoke, they won't be.</u>* (Underlining for emphasis).

134. On September 28th 2009, the Ontario Court of Appeal released its judgment in **Kennedy v. Leeds, Grenville and Lanark District Health Unit, [2009] O.J. No. 3957.** The issue was whether the appellant's premises constituted an "enclosed public place" within the meaning of section 9(1) of the Smoke Free Ontario Act, S.O. 1994, c. 10. Armstrong J.A. introduced the judgment as follows:

> *The appellant leased premises…which had been operated as …a Sports Bar. In order to avoid the provisions of the Smoke Free Ontario Act…the appellant*

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purported to operate the sports bar as a private club for people who paid a token monthly membership fee of $4.00.

135. The Court of Appeal held that the appellant's premises did constitute an "enclosed public place" and confirmed the conviction. In distinguishing that case from the case at bar it is essential to consider the following findings in **Kennedy:**

- Membership was solicited by recruiters who approached members of the public who were smokers;
- Application forms were provided to interested people, and were also available at the door;
- Members were required to sign the form, agree to pay $4.00 per month, and undertake to comply with certain rules;
- There was an electric "OPEN" sign in the window;
- There were no signs prohibiting entry, although one sign advised patrons who were sensitive to second hand smoke not to enter.

136. At paragraph 45, the Court held: "Read as a whole, the Act is clearly designed to eliminate smoking in public places and thus protect members of the public from contact with second hand smoke."

137. The overall purpose of the Smoke Free Ontario Act is to protect vulnerable non-smoking members of the public from contacting serious illnesses by coming into contact with second hand smoke which permeates the air in enclosed places. As the Court held in **Kennedy** the attempt to convert premises which are generally open to the public into a private club in the manner adopted by the appellant, reveals an obvious intention to circumvent the legislation, thus endangering the health of the public which the legislation was specifically designed to prevent.

138. **British Columbia (Attorney General) v. Pellikaan, [1986] B.C.J. No. 1709 (Supreme Court)** is a case which bears striking similarity to the case before me. The defendant was charged with selling raw milk contrary to the provincial Milk Industry Act and the Health by-law of the City of Vancouver. A public health inspector seized some of the milk, and tests revealed that the milk was unpasteurized, dirty, came from unhealthy cows, unsanitary and contaminated with excreta. The City obtained an interlocutory order restraining the defendant from selling his milk. The defendant subsequently incorporated a society called the "Canadian Theocratic Party", the stated purpose of which was to assist *those who required raw (unpasteurized) milk for religious or health reasons.* An Agricultural Officer telephoned the number provided in a newspaper advertisement, and asked: *Is this the place where I can buy raw milk?* The positive response, however, required him *to sign a paper* indicating that he was buying a share in a cow. The officer went to the farm, and bought the raw milk without having to say or sign anything in relation to purchasing a share in a cow. Similar incidents occurred on two subsequent occasions. Upon analysis, the milk was found to be badly contaminated and unfit for human consumption.

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139. In **Wholesale Travel Group Inc., [1991] S.C.R. 154** at paragraph 122, the Supreme Court of Canada made the following instructive comment in relation to the development of regulatory legislation pertaining to food and drink:

> *While some regulatory legislation such as that pertaining to the content of food and drink dates back to the Middle Ages, the number and significance of regulatory offences increased greatly with the onset of the Industrial Revolution. Unfettered industrialization had led to abuses. Regulations were therefore enacted to protect the vulnerable -- particularly the children, men and women who laboured long hours in dangerous and unhealthy surroundings. Without these regulations many would have died. It later became necessary to regulate the manufactured products themselves and, still later, the discharge of effluent resulting from the manufacturing process. There is no doubt that regulatory offences were originally and still are designed to protect those who are unable to protect themselves.*

140. And at paragraph 128 the Supreme Court continued with this theme in the process of distinguishing between criminal and regulatory offences:

> *At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.*

141. In my view, these poignant statements from the Supreme Court beg the question: "If the ultimate purpose of regulatory legislation is to protect those who are unable to protect themselves, especially those who are particularly vulnerable, do those members of society who expressly waive the need for protection, still need the protection"? Relating this to the case at bar, if, in consuming raw milk *per se* the cow share members are not committing an unlawful act, and they wish to continue to do that within the parameters of the essentially private cow share program, why should they be forced to be bound by legislation which is intrinsically aimed at the vulnerable – those who need the protection?

142. At paragraph 131 of **Wholesale Travel** the Supreme Court cautions:

> *…. it is sufficient to bear in mind that those who breach regulations may inflict serious harm on large segments of society. Therefore, the characterization of an offence as regulatory should not be thought to make light of either the potential harm to the vulnerable or the responsibility of those subject to regulation to ensure that the proscribed harm does not occur. It should also be remembered that, as social values change, the degree of moral blameworthiness attaching to certain conduct may change as well.*

143. In distinguishing the case at bar from the decisions in **Kipling, Kennedy and Pellikaan,** I find that the defendant's cow share program is a legitimate private enterprise which does not constitute "marketing" within Ontario. There is the undisputed evidence of the defendant that he did not solicit members, nor did he advertise or promote the sale of his dairy products to the public; the cow share booklet and membership cards were furnished to paid-up members exclusively; the signs at both the farm store and the blue

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bus clearly stated that milk products could only be purchased by members. Access to milk products was clearly not open to the public. His periodic "Mooosletters" were provided only to members, thereby keeping the membership informed about the dairy products. The members paid membership fees, the amounts of which clearly established their part ownership in the cows for their milking life.

144. There is also further compelling evidence that those who willingly became members did so after the defendant had ensured that they were fully informed about his products and his methods of production. In addition, there was a warning on the front cover of each cow share booklet that people who became members were consuming the dairy products at their own risk. Furthermore, as opposed to the facts in **Pellikaan**, there is no evidence that the cows and dairy product operations of the defendant were anything but clean and hygienic. Moreover, as opposed to the facts in **Kennedy**, there is no evidence whatsoever that members of the public were placed at risk by being in contact with or in the company of cow share members who were consuming raw milk products.

145. These findings support the existence of a valid private agreement between the defendant and the cow share members in terms of which he is responsible for the upkeep of the cows and the provision of milk for the membership. The responsibility of the members is to pay a fee for the upkeep of the cows, the production of the dairy products, and their delivery.

V. <u>Legislative Harmonization</u>

146. Because of the principle of harmony in enacting legislation, when different Acts are passed by the Legislature with essentially the same goal, the interpretation of both or all of such Acts should be harmonized so that they are in sync with one another.

147. Moreover, the Interpretation Act of Canada, section 15 (2) (b) connotes the principle of harmonious legislative interpretation. It reads:

> *Where an enactment contains an interpretation section or provision, it shall be read and construed as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.* R.S., c. I-23, s. 14.

148. In **Point-Claire (City) v. Quebec (Labour Court), [1997] 1.S.C.R. 1015,** the Supreme Court expressed the principle in these terms:

> *There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among statutes should prevail over discordant ones ...*

149. And later in **Bell Express Vu Limited Partnership v. Rex, [2002] 2 S.C.R. 559,** the Supreme Court of Canada expressed this principle in the following language:

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... where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in ***R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56,*** *at para. 52, as 'the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter'.*

150. *Related legislation refers to legislation that deals with the same subject as the provision to be interpreted or a related subject.* (4th Edition at page 261).

151. In **Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co.** (*supra)* the Ontario Superior Court was dealing with the issue of related legislation in the process of the interpretation of legislation under the Ontario 407 Act. At paragraph 33, the court said the following:

> *Related legislation forms part of the legal context of the statute to be interpreted and that context can be considered when interpreting the words in the statute.*

152. In conformity with this concept of related legislation, the court found at paragraph 33 of **Blue Star Trailers**:

> *It is evident that the legislature passed the* 407 Act *as a component part of the much broader statutory scheme enacted under the* HTA [Highway Traffic Act] *to govern the use, management and administration of highways and vehicles using highways in Ontario.*

153. The Smoke Free Ontario Act and the Ontario Health Protection and Promotion Act are prime examples of two separate pieces of legislation with identical purposes, namely protecting the health of the people of Ontario. As the Ontario Court of Appeal held in **Club Pro Adult Entertainment Inc. v. Ontario, [2008] O.J. No. 777:**

> *It was obvious that the pith and substance of the [Smoke Free Ontario] Act was to promote the health of Ontarians. It was valid provincial legislation pursuant to the provincial government's jurisdiction over health.*

154. In the Smoke Free Ontario Act the government enacted legal restrictions relating to the sale of cigarettes and other tobacco products to the public, and smoking in public places. I am of the view that in the case at bar, the defendant himself has established a self-imposed restriction on the sale of his dairy products so as to avoid the sale and consumption of his dairy products to and by the people of Ontario at large.

155. Related legislation *also includes other statutes that the court may consider helpful in interpretation. The courts determine on a case by case basis what significant relations may exist between the provision to be interpreted and the provisions of other statutes and what use may fairly be made of this material*. (4th edition at page 261).

156. In **R. v. Labaye, [2005] 3 S.C.R. 728**, the accused was charged under section 210(1) of the Criminal Code with keeping a common bawdy-house for the practice of

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acts of indecency. The accused operated a club in Montréal the purpose of which was to permit couples and single people to meet each other for group sex. Only members and their guests were admitted to the club. Prospective members were interviewed to ensure that they were aware of the nature of the activities of the club. Members paid an annual membership fee. A doorman manned the main door of the club, to ensure that only members and their guests entered. Entry to the club and participation in the sexual activities there was voluntary. The trial judge found that the premises constituted "a public place" within the meaning of section 197(1) of the Criminal Code, and convicted the accused. The Quebec Court of Appeal upheld the conviction. In a seven to two decision, the Supreme Court of Canada set aside the conviction and acquitted the accused.

157. In **Labaye** the Supreme Court was dealing with a criminal offence in relation to the public's standard of tolerance with respect to sexual activity. The issue was whether or not the activities of the accused were compatible with the proper functioning of Canadian Society. On the other hand, the case before me deals with regulatory offences in relation to public health. Nevertheless, as disconnected as the two cases may seem to be, for the reasons which follow, I find the reasoning of the majority in **Labaye** to be extremely helpful in interpreting the regulatory legislation concerned in the case at bar.

158. (a) There is compelling evidence before me that the people who are permitted to buy the raw milk products from the defendant -

- Are fully informed of the fact that the milk is not pasteurized, and are provided with a booklet explaining the farm practices and the respective responsibilities of the defendant and the cow share owners;
- Are given cow share membership cards in their own names;
- Purchase shares in the cows of their own free will;
- Pay an amount for the shares relative to the milking life of the cows;
- Consume the milk at their own risk;
- Are fully aware that the milk is not freely available to the public at large.

(b) In addition, it is essential to note that -

- There is no evidence that anyone ever became ill as a result of the consumption of the defendant's milk products; and
- The tests conducted by the Public Health Officials on the seized products revealed nothing more than that the milk had not been pasteurized, which in and of itself, is deemed to be a risk to public health by virtue of the provisions of the HPPA.

159. Similarly, in **Labaye**, the Supreme Court found that -

- On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch;

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- No one was pressured to have sex;
- The fact that the club is a commercial establishment does not in itself render the sexual activities taking place there commercial in nature;
- The membership fee buys access to a club where members can meet and engage in consensual activities with other individuals who have similar sexual interests;
- There was no evidence that the degree of possible health risks rose to the level of incompatibility with the proper functioning of society.

160. In **Labaye** the risk of contracting a sexually transmitted disease was discounted as a factor because the court found that "it is conceptually and causally unrelated to indecency". The court found that even if consideration were to be given to the risk "there seems to be no evidence that the degree of alleged harm rose to the level of incompatibility with the proper functioning of society".

161. In their dissenting judgment, it is noteworthy that Bastarache and LeBell JJ. held (at paragraph 76) that the decision of the majority not only constitutes "an unwarranted break with the most important principles of our past decisions regarding indecency, <u>but also replaces the community standard of tolerance with a harm-based test". (</u>Underlining for emphasis).

162. My understanding of the central principle of the majority in **Labaye** is that the primary reason why the sexual activities in the club were not regarded as an affront to socially acceptable norms of decent behaviour, was that the people who were permitted to enter the club were paid-up members who were entering voluntarily, and were fully aware of the range of sexual activities occurring therein, removed from the glare of the public at large.

163. Likewise, in the case before me, I am satisfied that the distribution of unpasteurized dairy products is reserved solely for paid-up and fully informed members of the program, who purchase shares voluntarily. They are informed that the consumption of the products is completely at their own risk. In addition, if I were to adopt a harm-based test in this case, it is of paramount importance to note that there is no evidence before me whatsoever that any person ever became ill as a result of his/her consumption of any of those products. Moreover, there is a significant amount of undisputed, compelling evidence from the defendant regarding the health, control and precautionary measures which he has put in place to ensure that his products *per se* do not constitute a health hazard to any of his family or cow share members.

164. It is clear that the HPPA simply creates a presumption that all unpasteurized dairy products constitute a health hazard to the people of Ontario. Section 1 defines a "health hazard" as:

a) a condition of a premise,

b) a substance, thing plant or animal other than man, or

c) a solid, liquid, gas or combination of any of them,

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that has or that is likely to have an adverse effect on the health of any person.

165. The peremptory prerequisite for issuing an order under section 13 is contained in section 11(1), which is also located in Part III ("Community Health Protection") under the sub-heading "Complaints re health hazard related to occupational or environmental health." Section 11(1) reads as follows:

Where a complaint is made to a board of health or a medical officer of health that a health hazard related to occupational or environmental health exists in the health unit served by the board of health or the medical officer of health, the medical officer of health shall notify the ministry of the Government of Ontario that has primary responsibility in the matter and, in consultation with the ministry, the medical officer of health shall investigate the complaint to determine whether the health hazard exists or does not exist. R.S.O. 1990, c. H.7, s. 11 (1).

166. I am satisfied from the undisputed evidence of the defendant that there has never been a report that someone became ill as a result of consuming any of his dairy products. Of significance too, is that notwithstanding the testing that was done on those products both before and after the seizure pursuant to the execution of the search warrant, there is no evidence from the Prosecution that the test results revealed an actual health hazard to the public. The 1994 Order was made and these charges were laid, in my view, merely because unpasteurized milk and milk products *per se* are deemed to be a health hazard as defined.

167. When the defendant was asked by the inspector during the execution of the search warrant and by the Crown during cross examination why he believed that his cow share program was able to circumvent the legislation, his response was that the program did not circumvent the legislation, but rather enabled him to function within the parameters of the legislation, which is exactly what he was trying to do after his failed appeal to the Appeal Tribunal in 1994.

168. Recent case law reveals a consistent and multi-faceted trend toward the admissibility of extrinsic materials of all types. In proving external context with respect to legislative interpretation *judges may engage in private research.* The informal sources of *noticing legislative facts and 'social framework' facts are newspapers, radio, television and conversation with colleagues. No doubt the internet will increasingly be a source of both.* (4th Edition at pages 463 and 464).

169. I am completely aware that what is accepted as lawful by the government of another province or country has no bearing whatsoever on whether such activity is lawful in Ontario. However, let me say *obiter,* that from my own personal research, I have good reason to believe that similar cow share programs are functioning lawfully in large parts of the world, including many states in the United States of America and Australia, to name but two. In addition, I understand that similar cow share programs have been established in parts of British Columbia, Nova Scotia and even in Ontario. In some countries, such as Great Britain, Germany, Finland, Sweden and New Zealand, farmers

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are permitted to sell their raw milk directly from the farm to consumers. The proponents of these arrangements stress that any food whatsoever can be contaminated so that food safety in general boils down to how it was produced, handled and packaged.

170. For all of these reasons I am not persuaded beyond a reasonable doubt that the defendant's raw milk enterprise, such as it is, constitutes a violation of any of the provisions of sections 18(1) or (2) of the HPPA, and there will be a finding of "not guilty" on all of those charges.

W. <u>The Grey-Bruce Charges</u>

171. These three charges were brought under section 100(1) of the HPPA.There is no need for me to repeat the charges which I have detailed in paragraph 6. In essence, on February 17th 1994 a Public Health Inspector made an order under section 13(1) of the HPPA prohibiting the defendant from distributing unpasteurized milk and milk products. The order was upheld on appeal with certain additional restrictions on the defendant's ability to sell, store or display his dairy products. He is alleged to have breached that order on three separate occasions in 2006 by storing and displaying unpasteurized milk and milk products.

172. Since the defendant did not launch a further appeal to such order, Crown Counsel Middlebro submits that the defendant is bound by the order, and that any attack on the validity of the order constitutes a collateral attack, which is prohibited in law. In support, the Crown provided the Court with several judgments including two decisions of the Supreme Court of Canada.

173. In **R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706**, the issue was the validity of an Administrative Order made under the Environmental Protection Act R.S.O. 1980 c. 141 ss. 17, 146 (1a). The Supreme Court of Canada held as follows:

> *Persons charged with failing to comply with an order made under this legislation may not collaterally attack the validity of the order after failing to avail themselves of the appeal mechanisms provided by the Act.*

174. The principle underlying the rule against collateral attacks is that "the ultimate validity of an order does not give a person in contempt of the order a defence to the contempt. Such an order is never a nullity; however wrong or irregular, it still binds. It cannot be questioned collaterally, and has full force and effect until set aside or reversed on appeal". See Libman on Regulatory Offences in Canada, Earlscourt Legal Press Inc. at page 7-223, relying on **Human Rights Commission v. Taylor, [1990] 3 S.C.R. 892.** See also: **R. v. Klippert Ltd., [1998] S.C.R. 737; R. v. 135837 Ontario Inc., [2007] O.J. No. 433 (O.P.C.); R. v. Hoy, [2008] O.J. No. 982 (O.C.J.); R. v. Ambrosi, [2008] B.C.J. No. 1286 (B.C.S.C.).**

175. It seems abundantly clear to me that all of these cases and numerous others which I have read during my own research, deal with the prohibition against collateral attacks which are attacks on the validity of the court or administrative orders *per se*. In contrast, I do not perceive Mr. Schmidt's defence to the Grey-Bruce charges as being an attack on the Order itself, but rather his defence appears to be that although the Order is valid, the way that he has structured his business in relation to dairy products amounts to full compliance with the Order in that he does not commit the acts alleged to be prohibited

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with respect to the public at large, which is his understanding of the Order and the purpose therefor under the HPPA.

176. In a judgment rendered some 10 months ago on March 12, 2009, the Ontario Court of Appeal considered the Collateral Attack Rule in the context of criminal proceedings in relation to a charge of breaching an Undertaking issued by a police officer. See **R. v. Oliveira, 2009 ONCA 219.** In ruling that the defence to the charge did not amount to a collateral attack on the Undertaking, the Court of Appeal explained, at paragraphs 26 and 27, that –

> *The respondent does not challenge the validity of the undertaking or the propriety of any of its terms. He does not suggest that the order was improper when made or that he was not bound to comply with that order. The respondent argues that* ***by virtue of subsequent events,*** *the operative Criminal Code provisions, and jurisprudence from this court interpreting those provisions, the undertaking was not in force on the date of the alleged breach.... The respondent's defence does not collaterally attack the validity of any order, but takes issue with an essential component of the actus reus of the crime charged by the prosecution.*

177. Similarly, in the case at bar, the defendant acknowledges in the Statement of Agreed Facts that the order was properly made. However, the dispute arises only in relation to its current applicability to him. As in **Oliveira**, Mr. Schmidt's defence to the Grey-Bruce charges is that **"by virtue of subsequent events"** the Order no longer applied to him**.** I do not find that this defence amounts to a collateral attack on the validity of the order. My understanding is that during the 1994 proceedings, his defence of his ***cow-lease*** plan was rejected by the Appeal Board. In that case ownership of the cows remained vested in the defendant. In my view, the establishment of the **cow-share** program creates a sharing of ownership of the cows amongst the members, which is quite different from the leasing program. Consequently, I find that the defendant did not breach the Order as alleged, and that the Prosecution has failed to prove the *actus reus* of the Grey-Bruce charges beyond a reasonable doubt, and there will be a finding of "not guilty".

X. <u>The Law Is Always Speaking</u>

178. In support of the interpretation which I have adopted with respect to the legislation in these proceedings, I could not do better than refer to the decision of the Chief Justice of the Supreme Court of Canada in **R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575**. Chief Justice McLachlin, expressing the evolutionary process of statutory interpretation, gave direction to the courts. At paragraph 38 the Chief Justice stated as follows:

> *The intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day. Such an approach risks frustrating the very purpose of the legislation by rendering it incapable of responding to the inevitability of changing circumstances. Instead, we recognize that the law speaks continually once adopted:* ***Tataryn v. Tataryn Estates, [1994] 2 S.C.R. 807*** *at p. 814; see also Interpretation Act, R.S.O. 1990, c. I11, s.4. Preserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to*

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evolving social and material realities. While the courts strive ultimately to give effect to legislative intention, the will of the legislature must be interpreted in light of prevailing, rather than historical circumstances.

179. In the *dictum* which I just quoted, the Chief Justice made reference to the Supreme Court's earlier decision in the **Tataryn** case (*supra)* in which the court was dealing with the interpretation of the British Columbia Wills Variation Act, R.S.B.C. 1979, c. 435, section 2(1). At paragraph 15 the court held as follows:

> *Whatever the answers to the specific questions, this much seems clear. The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (Interpretation Act, R.S.B.C. 1979, c. 206, s. 7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is considered adequate, just and equitable in the 1990s. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.*

180. The Prosecution argues that the entire cow share program is simply a scheme invented by the defendant to circumvent the legislation. However, the cow-share program as it has been developed and fine-tuned by the defendant, may also be seen as a legitimate attempt by the defendant to function within the confines of the legislation.

181. While all of the products grown and produced by the defendant are available for sale to every member of the public who is prepared to pay the price, the milk and milk products are reserved for sale and distribution only to specific members of the public, namely those who are knowledgeable (not vulnerable), paid-up and properly informed members of the cow share program especially created by the defendant so as to make these products available for certain members of the public who wish to obtain them. By so doing, the defendant maintains that he has done everything reasonably possible to achieve that purpose while remaining within the confines and the spirit of the legislation. I agree.

Y. <u>Contempt Conviction</u>

182. In his Reasons for Sentencing Mr. Schmidt for Contempt of Court on December 2, 2008, Boswell J. of the Ontario Superior Court, said at paragraph 9:

> *As I said in my Reasons for finding Mr. Schmidt in contempt, this is not a case about the merits of raw milk, nor for that matter, the bigger picture about the limits of acceptable governmental regulation over our lives. This is a case about the integrity of the administration of justice in our community and the importance of respect for court orders.*

183. I am in complete agreement with the learned Judge. However, in the case before me, I have adopted a different interpretation of the legislation itself for all the reasons which I have given. In **(Prostitution Reference), [1990] 1 S.C.R. 1123**, Lamer J. as he then was, explained that the meaning of any legislation must not be considered in isolation, but

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rather *in the context of possible judicial interpretation* and that *the fact that different courts have given different interpretations to the provision is not fatal.*

Z. Closing Remarks

184. Having found the defendant not guilty on all charges before this court, there is no need for me to rule on the defendant's constitutional challenge pursuant to section 7 of the Canadian Charter of Rights and Freedoms.

185. I wish to make it perfectly clear that my decision to acquit the defendant on all charges-

- in no way stands for the proposition that henceforth it is legal to market unpasteurized milk and milk products in the Province of Ontario;
- in no way purports to undermine or invalidate the milk marketing legislation in this Province, which has been held to be valid legislation by the Ontario Divisional Court in **Allan v. Ontario (Attorney General)** (*supra*);
- in no way supports either side of the debate on whether the consumption of unpasteurized milk or milk products is healthy or constitutes a health hazard;
- in no way condones the activity of any person who disobeys a valid order made by any court or government tribunal in this Province.

186. Indeed, the milk marketing legislation remains of full force and effect until such time as it is amended or revoked by the Legislature or held to be unconstitutional or otherwise invalid by a court of competent jurisdiction.

P.Kowarsky J.P.
Ontario Court of Justice
January 21st 2010

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TAB 2

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Schmidt, 2014 ONCA 188
DATE: 20140311
DOCKET: C55843

Weiler, Sharpe and Blair JJ.A.

BETWEEN

Her Majesty the Queen

Respondent on Appeal

and

Michael Schmidt

Applicant on Appeal

Derek From and Chris Schafer, for the appellant

Shannon Chace, Michael Dunn and Daniel Huffaker, for the respondent

Heard: February 5, 2014

On appeal from the convictions entered on September 28, 2011 by Justice Peter Tetley of the Ontario Court of Justice, sitting on appeal from the acquittals entered on January 20 2010 by Justice of the Peace P. Kowarsky.

Sharpe J.A.:

[1] The appellant, Michael Schmidt, is a milk farmer who produces and advocates the consumption of unpasteurized milk. The sale and distribution of unpasteurized milk and milk products is prohibited by the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 ("*HPPA*"). However, the *HPPA* does not prohibit the consumption of unpasteurized milk and an individual can legally

consume unpasteurized milk obtained from his or her own cow. The appellant provided unpasteurized milk and milk products to individuals who paid a capital sum to acquire a fractional interest in a cow in what he described as a “cow share agreement”. The appellant testified that cow-share members also paid an amount per litre to cover the cost of keeping the cow and producing the milk.

[2] The appellant was charged with several counts of selling and distributing of unpasteurized milk and cheese contrary to the *HPPA*, operating an unlicensed milk plant contrary to the *Milk Act*, R.S.O. 1990, c. M.12, and failing to obey an order of the Public Health Inspector. The appellant argued that he did not violate the *HPPA* or the *Milk Act* by providing unpasteurized milk to individuals who had entered into cow-share agreements and, in any event, submitted that those statutory prohibitions are contrary to the *Charter of Rights and Freedoms,* s. 7.

[3] At trial, the Justice of the Peace accepted the appellant’s argument that providing milk to those who had entered cow-share agreements was not caught by the legislation and acquitted the appellant on all charges.

[4] On appeal to the Ontario Court of Justice, the appeal judge found that the Justice of the Peace had erred in his approach to statutory interpretation. The appeal judge went on to consider the *Charter* arguments and concluded that there was no violation of the interests protected by s. 7 and that, given the preponderance of scientific evidence as to the risk to public health posed by

unpasteurized milk, the impugned legislation did not violate the principles of fundamental justice on the ground that it was arbitrary or overbroad. The appeal judge entered convictions on thirteen counts and imposed fines totaling $9,150 and one year of probation.

[5] The appellant appeals those convictions, with leave, to this court. Leave to appeal the sentence was refused. For the following reasons, I would dismiss the appeal.

FACTS

[6] The appellant is an experienced organic farmer with a deeply committed belief in the benefits of unpasteurized milk. The appellant endeavored to comply with the *HPPA* through his cow-share program. Cow-share members paid the appellant a capital sum ranging between $300 and $1200 and were required to pay a per litre charge for the services involved in keeping the cow, milking the cow, and bottling and transporting the milk. Although the capital sum of $300 was said to give a member a ¼ interest in a cow, the herd consisted of 24 cows and there were approximately 150 individual or family cow-share members.

[7] The cow-share agreements were oral in nature. Members were given a card but the cards did not contain the name of a cow and there was no other evidence that the name of the cow in which the member had a share was ever communicated. Nor was there any evidence that the agreements formally

transferred ownership in a cow from the appellant to the member. The members were not involved in the purchase, care, sale, or replacement of any cow nor were they involved in the management of the herd. The appellant provided cow-share members with a handbook outlining the scheme. It states: “As a cow-share member, you are a part owner of the milk production. In effect, you are paying [the appellant and his wife] to look after the cows and produce the milk…”

[8] The appellant contends that the cow-share agreements are a form of agistment, a traditional common law arrangement whereby the agister cares for cattle and livestock owned by others for remuneration.

[9] The appellant did not have a licence to operate his plant pursuant to the *Milk Act* and he was subject to a 1994 cease and desist order issued by the Public Health Inspector forbidding the appellant from storing and displaying unpasteurized milk and milk products.

[10] The Crown led evidence as to the health risks and benefits of consuming unpasteurized milk. The appellant led evidence that suggested that there were potential health benefits from the consumption of unpasteurized milk including possible protection against asthma and allergies. He pointed out that several American states permit some form of unpasteurized milk sale to the public and that there was no suggestion that anyone had suffered ill-effects from consuming the milk he produced. The Crown highlighted the fact that even the evidence

relied on by the appellant concludes that despite the potential benefits, because of the risks posed by pathogens, consumption of unpasteurized milk is not recommended.

LEGISLATION

[11] The *HPPA*, s. 18, prohibits the sale, delivery and distribution of unpasteurized milk and milk products:

> **Unpasteurized or unsterilized milk**
>
> 18. (1) No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*.
>
> **Milk products**
>
> (2) No person shall sell, offer for sale, deliver or distribute a milk product processed or derived from milk that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*.
>
> **Exception**
>
> (3) Subsection (1) does not apply in respect of milk or cream that is sold, offered for sale, delivered or distributed to a plant licensed under the Milk Act.

The *HPPA* does not define the terms “sale”, “deliver” or “distribute”.

[12] The *Milk Act,* s. 15, prohibits the operation of a plant without a licence:

> **Licence to operate plant**
>
> 15. (1) No person shall operate a plant without a licence therefor from the Director.

> **Licence to operate as distributor**
>
> (2) No person shall carry on business as a distributor without a licence therefor from the Director.

[13] The following definitions are found in the *Milk Act,* s. 1:

> "distributor" means a person engaged in selling or distributing fluid milk products directly or indirectly to consumers; ("distributeur")
>
> ...
>
> "milk product" means any product processed or derived in whole or in part from milk, and includes cream, butter, cheese, cottage cheese, condensed milk, milk powder, dry milk, ice cream, ice cream mix, casein, malted milk, sherbet and such other products as are designated as milk products in the regulations; ("produit du lait")
>
> ...
>
> "processing" means heating, pasteurizing, evaporating, drying, churning, freezing, packaging, packing, separating into component parts, combining with other substances by any process or otherwise treating milk or cream or milk products in the manufacture or preparation of milk products or fluid milk products; ("transformation")
>
> "processor" means a person engaged in the processing of milk products or fluid milk products; ("préposé à la transformation")

TRIAL AND APPEAL DECISIONS

Trial before the Justice of the Peace

[14] At trial, the Justice of the Peace found that the appellant's cow-share program was essentially a private scheme that was not caught by either the *HPPA* or the *Milk Act.* The Justice of the Peace held that the legislation should be given a restrictive interpretation so that it did not apply to what he viewed as essentially a private arrangement. As he held that the legislation did not apply,

the Justice of the Peace did not find it necessary to consider the *Charter* arguments raised by the appellant.

Appeal to the Ontario Court of Justice

[15] The appeal judge dismissed the Crown's appeal with respect to one count of selling unpasteurized cheese to a non cow-share member on the basis of the Justice of the Peace's conclusion that he had a reasonable doubt as to whether the individual had paid for the cheese. The appeal judge also dismissed the Crown's appeal from acquittal for the alleged breach of the twelve-year old order of the Public Health Inspector. However, the appeal judge disagreed with the Justice of the Peace's interpretation of the legislation and the cow-share agreements and found that by operating his plant and selling and distributing milk to cow-share members, the appellant had violated both statutes. The appeal judge went on to consider and reject the contention that the legislation violated s. 7 of the *Charter*.

MOTION TO ADDUCE FRESH EVIDENCE

[16] The appellant moves to introduce as fresh evidence an affidavit of an expert witness giving an opinion based on a recently published article as to the protective effect of unpasteurized milk in relation to childhood asthma and atopy.

ISSUES

[17] The appellant raises three issues on appeal to this court:

1. Did the appeal judge err in his interpretation of the *HPPA* and the *Milk Act* and in failing to give due recognition to the cow-share plan?
2. Should the proposed fresh evidence be admitted?
3. Did the appeal judge err in concluding that neither the *HPPA* nor the *Milk Act* violated s. 7 of the *Charter*?

ANALYSIS

1. Did the appeal judge err in his interpretation of the *HPPA* and the *Milk Act* and in failing to give due recognition to the cow-share plan?

Statutory purpose

[18] The *HPPA*, s. 2 states that one of the purposes of the Act is "the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario". Similarly, one of the stated purposes of the *Milk Act*, s. 2 is "to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario".

[19] Acting in pursuit of these purposes, the legislature has determined that the consumption of unpasteurized milk poses serious risks to public health. While the scientific evidence relates primarily to the *Charter* issue, a brief review of that evidence at this point will provide context for the discussion of statutory interpretation.

Evidence of harm

[20] The record in this case reveals that there is a substantial body of scientific evidence that pasteurization kills pathogens found in raw milk. Those pathogens can cause serious illness. Pasteurization effectively reduces the risk to public health posed by pathogens to an acceptable level. Even the appellant's experts concede that their view that unpasteurized milk is safe represents a minority within the scientific community. A study relied on by the appellant that suggested that unpasteurized milk may have certain health benefits cautioned that "consumption of unpasteurized farm milk cannot be recommended as a preventative measure" because of the risk of illness. After a careful review of the evidence, the appeal judge concluded, at para. 85:

> The preponderance of scientific evidence cited offers factual support for the assertion that human consumption of unpasteurized milk may be hazardous to one's heath or at least more hazardous than the health risk presented by the consumption of pasteurized milk.

There was ample evidence to support that finding.

[21] The appellant and his followers disagree with the scientific evidence and have what appears to be a sincere and honest belief in the benefits of unpasteurized milk. However, provided that the legislature has acted within the limits imposed by the constitution, the legislature's decision to ban the sale and

distribution of unpasteurized milk to protect and promote public health in Ontario is one that must be respected by this court.

Statutory interpretation

[22] The appellant argues that as the *HPPA* does not define the term "distribute", reference should be had to the definition of "distributor" in the *Milk Act*, a closely related statute. Under that definition, a distributor is a "person engaged in selling or distributing fluid milk products" and the definition of fluid milk products points to milk that has been pasteurized. From this chain of reasoning, the appellant argues that as he was not distributing pasteurized milk, he did not "distribute" unpasteurized milk within the meaning of the *HPPA*, s. 18. This tortured submission must be rejected. It would produce an absurd result that would eviscerate s. 18 of any meaning.

[23] In my view, the appeal judge applied the correct approach to the interpretation of s. 18. It is well-established that public welfare legislation is to be accorded a broad and liberal interpretation that is consistent with its purpose. Narrow interpretations that would frustrate the legislature's public welfare objectives are to be avoided: *Blue Mountain Resorts Ltd. v. Bok*, 2013 ONCA 75 at para. 24-25; *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.) at para. 16

[24] The transactions involving unpasteurized milk that form the subject of the charges fall squarely with the ordinary meaning of the words “sale” and “distribute” as does the appellant’s dairy operation fall within the ordinary meaning of “plant” and “premises in which milk or cream or milk products are processed”. To conclude otherwise would be to ignore the jurisprudence on proper approach to the interpretation of public welfare legislation and the direction given in the *Legislation Act, 2006* S.O. 2006, c.21, Sched. F, s. 64, that all legislation is deemed to be remedial and should be given a liberal and purposive interpretation.

Cow-share agreements

[25] I do not accept the submission that the cow-share agreements amount to an arrangement that takes the appellant’s activities outside the reach of the *HPPA* and the *Milk Act*. The oral cow-share agreement does not transfer an ownership interest in a particular cow or in the herd as a whole. The member does not acquire or exercise the rights that ordinarily attach to ownership. The member is not involved in the acquisition, disposition or care of any cow or of the herd. The cow-share member acquires a right of access to the milk produced by the appellant’s dairy farm, a right that is not derived from an ownership interest in any cow or cows. As the appeal judge put it, at para. 51, “the cow-share arrangement approximates membership in a ‘big box’ store that requires a fee to be paid in order to gain access to the products located therein.” This court has

resisted schemes that purport to create “private” enclaves immune to the reach of public health legislation and has insisted that public health legislation not be crippled by a narrow interpretation that would defeat its objective of protecting the public from risks to health: *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685 at paras. 45-47.

[26] Within the limits of the production capacity of the appellant’s dairy farm, any member of the public can acquire unpasteurized milk by becoming a cow-share member. In my view, the cow-share arrangement is nothing more than a marketing and distribution scheme that is offered to the public at large by the appellant. I accordingly cannot accept the Justice of the Peace’s interpretation that the cow-share arrangement constitutes a private arrangement to which s. 18 was not intended to apply.

[27] For similar reasons, I cannot accept the appellant’s submission that the *Milk Act* licence requirement does not apply to the appellant’s operation. The *Milk Act* makes no exception for “private” operations. Even if it did, the appellant operates a plant from which any member of the public can procure unpasteurized milk.

[28] I conclude that there is no merit in the appellant’s contention that he is not engaged in the sale, delivery and distribution of unpasteurized milk and milk

products, contrary to the *HPPA*, s. 18 or that he does not operate a plant without a licence contrary to the *Milk Act*, s. 15.

2. Should the proposed fresh evidence be admitted?

[29] The test for the admission of fresh evidence on appeal was laid down in *Palmer v. The Queen,* [1980] 1 S.C.R. 759, at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[30] It is my view that the proposed fresh evidence should not be admitted. Assuming that the appellant is able to satisfy the first three criteria, I fail to see how this evidence could be expected to have affected the result at trial. First, it essentially replicates evidence that was led at trial to the effect that unpasteurized milk could benefit children who have asthma and allergies. Second, like the evidence led at trial, the recent study concludes that despite

those possible beneficial effects, “on the basis of current knowledge, raw milk consumption cannot be recommended because it might contain pathogens”.

[31] In my view, the proposed fresh evidence supports the position of the respondent that on the basis of current scientific knowledge, the consumption of unpasteurized milk poses a risk to public health and cannot be recommended. Such evidence could not have affected the result and for that reason, should not be admitted on appeal.

3. Did the appeal judge err in concluding that neither the *HPPA* nor the *Milk Act* violated s. 7 of the *Charter*?

[32] To satisfy the onus imposed on the appellant to establish a breach of s. 7 of the Charter, the appellant must show that the impugned legislation: (a) interferes with life, liberty or security of the person, and (b) that it does so in a manner that does not comport with the principles of fundamental justice.

Standing

[33] I agree with the appellant that, as conceded by the respondent, the appeal judge erred by concluding that the appellant lacks standing to base his *Charter* challenge on any infringement of the s. 7 rights of the cow-share members supplied by the appellant: see *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at pp. 313-314.

Security of the person

[34] The appellant contends that by banning the sale and distribution of unpasteurized milk and thereby depriving cow-share members of the right to acquire a product they deem beneficial to their health, the *HPPA* violates their right to security of the person.

[35] I disagree with that submission. The impugned legislation prohibits the appellant from selling or distributing a product that certain individuals think beneficial to their health. As this court held in *R. v. Mernagh,* 2013 ONCA 67 at paras. 66 to 74, dealing with the consumption of marijuana, a s. 7 violation cannot be made out on the basis of an individual's subjective belief that a banned substance would benefit his or her health. There is no scientific or medical evidence of the kind contemplated in *Mernagh* to support the proposition that consumption of unpasteurized milk would benefit the health of any cow-share member. This case is readily distinguished from *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.) where there was medical evidence to substantiate the claim that the health of the right's claimant would improve if he were allowed to consume marijuana.

[36] Nor does the ban on the sale and distribution of unpasteurized milk constitute an infringement of security of the person akin to that encountered in cases where the state seeks to administer medical treatment without the individual's consent: see e.g. *Fleming v. Reid*,(1991), 4 O.R. (3d) 74 (C.A.). In

those cases, by administering unwanted medical treatment, the state interferes with the individual's bodily integrity. In this case, the ban simply prevents an individual from acquiring a product that the individual subjectively believes would be beneficial.

Liberty

[37] The appellant argues that the impugned legislation infringes the liberty interest by limiting his right to freedom of contract and the freedom of the cow-share members to make a decision of fundamental personal importance.

[38] As the appellant candidly conceded in oral argument, in making this submission, the appellant invites us to depart from the existing jurisprudence. While the Supreme Court of Canada has not foreclosed the possibility that s. 7 may evolve to protect certain economic rights such as a basic minimum level of subsistence, the proposition that s. 7 protects freedom of contract or the right to engage in the economic activity of one's choice has been rejected. In *Siemens v. Manitoba (Attorney General),* 2003 SCC 3 at para. 46, the Supreme Court held that "[t]he ability to generate business revenue by one's chosen means is not a right protected under s. 7 of the *Charter.*" In *Edwards Books and Art Ltd. v. R.,* [1986] 2 S.C.R. 713 at pp. 785-6, Dickson C.J. held that the right to liberty protected by s. 7 "is not synonymous with unconstrained freedom" and "does not extend to an unconstrained right to transact business whenever one wishes."

Even if it were in the power of the court to do so, I can see no reason to depart from these authorities on the facts of this case.

[39] I agree with the respondent that the appellant's argument that the *Ontario Human Rights Code*, s. 3, recognizing the right to contract on equal terms without discrimination on enumerated grounds, does not create a free standing right to freedom of contract.

[40] I also agree with the respondent that preventing an individual from drinking unpasteurized milk does not fall within the "irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844 at para. 66. In my view, the appellant's argument to the contrary cannot be accepted in the face of the holding in *R. v. Malmo-Levine,* 2003 SCC 74, at para. 86, that "the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle." Lifestyle choices as to food or substances to be consumed do not attract *Charter* protection as "[a] society that extended constitutional protection to any and all such lifestyles would be ungovernable." Such choices, held the court, citing *Godbout* at para. 66, are not "basic choices going to the core of what it means to enjoy individual dignity and independence".

[41] Finally, the appellant submits that security of the person is engaged because the appellant is liable to probation and pay a fine and, if the fine is not paid, to imprisonment.

[42] I disagree.

[43] The statutory terms of probation (*Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 72(2)) – that the defendant not commit the same or any related or similar offence, or any offence that is punishable by imprisonment; appear before the court as and when required, and notify the court of any change in the defendant's address – do not have a significant impact on the appellant's liberty.

[44] This court has held that the risk of imprisonment in default of payment of a fine under the *Provincial Offences Act* is sufficiently remote that it does not engage the liberty interest under s. 7: *R. v. Polewsky* (2005), 202 C.C.C. (3d) 257 (Ont. C.A.), at para. 4.

Principles of fundamental justice

[45] If there is an infringement of life, liberty and security of the person, the appellant must show that such infringement is not in accord with the principles of fundamental justice. The appellant submits that s. 18 of the *HPPA* and s. 15 of the *Milk Act* violate the principles of fundamental justice because they are arbitrary and overbroad.

[46] A law is arbitrary where there is "*no connection* to its objective" (emphasis in original): *Bedford v. Canada*, 2013 SCC 72, at para 111. A law is overbroad "where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts" (emphasis in original): *Bedford*, at para 112. The scientific evidence that I have already mentioned easily reaches the standard of "sufficient evidence to give rise to a reasoned apprehension of harm to permit the legislature to act": *Cochrane v. Ontario (A.G.),* 2008 ONCA 718, at para. 29, leave to appeal refused [2009] SCCA No. 105; *R. v. Malmo-Levine* at para. 133. The law does not offend the overbreadth principle by targeting all unpasteurized milk. There is no evidence to suggest that the legislature could somehow narrow the reach of the legislation and still achieve it purpose of protecting public health.

Section 1

[47] As I have found that there is no violation of s. 7, it is unnecessary for me to consider whether any violation is justified as a reasonable limit prescribed by law under s. 1 of the *Charter*.

CONCLUSION

[48] For these reasons, I would dismiss the appeal.

"Robert J. Sharpe J.A."
I agree K.M. Weiler J.A."
"I agree R.A. Blair J.A.

Released: March 11, 2014

TAB 3

CITATION: The Law Society of Upper Canada v. Coulson, 2013 ONSC 2448
COURT FILE NO.: CV-12-00469034
DATE: 20130424

2013 ONSC 2448 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Law Society of Upper Canada, Plaintiff

AND:

Chantal Coulson, Defendant

BEFORE: Carole J. Brown J.

COUNSEL: *E. Pleet and J. Camp*, for the Plaintiff

No one appearing for the Respondent, Chantal Coulson, although properly served

HEARD: April 24, 2013

ENDORSEMENT

[1] The Law Society of Upper Canada ("LSUC") seeks a permanent statutory injunction restraining the respondent, Chantal Coulson ("Coulson"), or any company or business entity controlled by her, from practicing law or providing legal services in Ontario in contravention of Section 26.1 of the *Law Society Act*, R.S.O. 1990 c. L.8, as amended (the "*Act*") and a permanent statutory injunction restraining the Respondent, Coulson, or any company or business entity controlled by her, from holding herself out as, or representing herself to be, a person who may practice law or provide legal services in Ontario in contravention of Section 26.1 of the *Act*.

The Evidence

[2] The evidence indicates that Coulson is not licensed by the LSUC to provide legal services or to practice law. The evidence further establishes that Coulson held herself out as being entitled to provide legal services, advertising on www.kijiji.com and on http://www.legalservices. 2010.webs.com. She further distributed business cards offering "Paralegal & Law Clerk Services". The evidence establishes that she advertised her services broadly, that she was based in the Hamilton area and had provided legal services in Belleville, the Greater Toronto Area and in Thunder Bay. The evidence includes seven affidavits from various individuals, including those who had lodged complaints against her with the LSUC, as well as an affidavit from the LSUC investigator who undertook the investigation of this matter. The affidavit evidence establishes that she attempted to recruit classmates from her law clerk program to assist her in providing legal services. She obtained retainers on behalf of individuals who saw her advertisements on the Internet and retained her. In the case of two of the affiants, Ms. Stirton, who provided her with a retainer fee of $800 and Ms. Leobrera who paid her $250

as a down payment for a $500 retainer fee, no services were rendered by Coulson, nor were their retainer fees refunded, despite their requests. The evidence further indicates that she acted or attempted to act on behalf of individuals in Superior Court proceedings, a criminal matter before the Ontario Court of Justice, in Small Claims Court matters and before the Landlord and Tenant Board ("LTB").

[3] In the matter of Coulson's attempted appearance before the LTB on behalf of the landlord, who had paid her a retainer fee, she was asked by the LTB whether she was licensed. She advised the Board that she was not licensed, was not a paralegal, but was a law clerk and that her "education is above a paralegal". She further advised the Board that she had been representing landlords previously before the LTB. The Board refused to permit her to represent the Landlord, as she was not licensed. In their reasons released December 30, 2011, the Board found as follows:

> "The Landlords' representative, Chantal Coulson, attended on November 15, 2011, but was not allowed to represent them because she is in the business of providing legal assistance but is not licensed under the *Law Society Act*. The Landlords testified that they had paid a fee for Ms. Coulson's legal assistance".

[4] In her advertisements online, Coulson advertised her services as including representation, preparation of documents and advice relating to the Small Claims Court, the Landlord and Tenant Tribunal, Criminal Court matters, Provincial Offences Court, civil litigation in the Superior Court of Justice, completion or drafting of all legal and court documents and mediation and negotiation services.

Issue

[5] The issue raised by this application is whether a statutory injunction should issue pursuant to Section 26.3 of the *Act* to permanently restrain Coulson and any business with which she is affiliated from practicing law, providing legal services, or holding herself out as a person who is entitled to practice law or provide legal services.

The Law and Analysis

[6] The applicable test in determining whether a statutory injunction should issue is different from the test applicable to common law injunctions set forth in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 S.C.C. 199. The applicable test is as set forth at *R. v IPSCO Recycling Inc.*, [2003] F.C.J. No 1950 at paragraph 51. Among the applicable legal principles in determining whether to grant a statutory injunction, the Court observed in *R. v. IPSCO, supra.*, that "the Court retains a discretion as to whether to grant conjunctive relief. Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed."

[7] The importance of the public interest and the importance of the LSUC's role in protecting the public from the activities of unlicensed and unregulated persons holding themselves out as lawyers and paralegals in the determination of this matter are paramount, as recognized in *LSUC*

2013 ONSC 2448 (CanLII)

v. Chiarelli, 2013 ONSC 1428. It is clear from the evidence before me that members of the public, including several of the affiants, have been harmed or taken advantage of by Coulson's actions. The LSUC licensing regime is designed to protect the public from actions and practices such as those undertaken by Coulson.

[8] I am satisfied, based on all of the materials before me, that Ms. Coulson has been engaging in the provision of legal services in contravention of Sections 1 (5)-(7) of the *Act*, as well as holding herself out as a person who practices law or provides legal services. I am satisfied that, in the public interest in preventing the unauthorized practice of law so as to protect the public, a statutory injunction permanently restraining Coulson and any company or business entity controlled by her from engaging in the practice of law or in the provision of legal services in Ontario and from advertising or holding herself out as a person who may practice law or provide legal services in Ontario, contrary to Section 26.1 of the *Act*, should issue.

2013 ONSC 2448 (CanLII)

Order

[9] I Order as follows:

1. Chantal Coulson or any company or business entity controlled by her is terminally enjoined from engaging in the practice of law or in the provision of legal services in Ontario in contravention of Section 26.1 of the *Act*;

2. Chantal Coulson or any company or business entity controlled by her, is permanently enjoined from advertising or holder herself out as a person who may practice law or provide legal services in Ontario, contrary to Section 26.1 of the *Act*.

This includes, but is not limited to:

(a) stating that she is entitled to provide:

(i) paralegal services: or
(ii) legal services;

(b) stating that she is entitled to represent a person in preceding the foreign adjudicative body, including:

(i) Traffic Court;
(ii) Small Claims Court;
(iii) Provincial Offenses Court;
(iv) the Landlord and Tenant Tribunal; or
(v) Criminal Court;

(c) stating that she is entitled to draft any document that affects the legal interests, rights or responsibilities of a person, including:

(i) court documents;
(ii) government documents;
(iii) contract; or
(iv) leases;

(d) publishing an advertisement in any media, including in print or online, advertising any of the above; or

(e) maintaining any website advertising in the above.

3. Coulson shall forthwith remove the website at http://www. legalservices2011. webs. com.

Costs

[10] The Applicant has provided its bill of costs. Having consideration for the factors set forth in Rule 57.01 the *Rules of Civil Procedure*, and the decision of the Divisional Court in *Geographic Resources Integrated Data Solutions Limited v Peterson*, 2013 ONSC 1041, referred to by the Applicant, I award the Applicant its partial indemnity costs in the amount of $17,850.94 all inclusive.

Carole J. Brown J.

Date: April 24, 2013

2013 ONSC 2448 (CanLII)

TAB 4

Citation: City of Vancouver v. Maurice et al.
2002 BCSC 1421

Date: 20021122

Docket: L023374

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Lowry
As Pronounced in Chambers
November 22, 2002

BETWEEN:

CITY OF VANCOUVER

PLAINTIFF

AND:

CLAUDE MAURICE, KERRY PAKARINEN, ANTON PILIPPA, CRAIG BALLANTYNE, JIM LEYDEN, JANE DOE, JOHN DOE AND OTHER PERSONS UNKNOWN, ERECTING, MAINTAINING, OR OCCUPYING TENTS, STRUCTURES AND OTHER OBJECTS ON CITY OF VANCOUVER STREETS IN THE 100 BLOCK WEST HASTINGS STREET, THE 300 BLOCK ABBOTT STREET, OR THE 100 BLOCK WEST CORDOVA STREET, VANCOUVER, BRITISH COLUMBIA

DEFENDANTS

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENOR

Counsel for the Plaintiff:	C.M. Kinahan T.M. Zworski
Counsel for the Defendants, Claude Maurice, Kerry Pakarinen and Anton Pilippa:	A.C. Ward
Counsel for the Defendant, Craig Ballantyne:	P.H. Dickie
Counsel for the Defendant, Michael Platts:	D.W. Mossop, Q.C.
Counsel for the Defendant, Dayle Scheltgen:	N. Quastel
Counsel for the Defendants, Natasha	J.E. Richardson

Amanda Mazzitelli and Reverend David Ouimet:

Counsel for the Intervenor, British Columbia Civil Liberties Association: L. McGrady, Q.C.

[1] **THE COURT:** The City of Vancouver applies for a statutory injunction to bring to an end the contravention of its Street and Traffic by-law by a large group of as many as 200 people. Their belongings – tents, mattresses, and personal effects — described in the Notice of Motion as the "Structures", obstruct the sidewalks around what was at one time the downtown Woodward's Department Store. The defendants who appear by counsel, and the B.C. Civil Liberties Association which intervenes, contend that no injunction should be granted or that its imposition should be restricted and deferred for some period of time. A broad range of issues are raised to which I will turn after first setting out the basis upon which the application is made.

[2] Section 71(1) of the by-law provides:

> No person shall build, construct, place, maintain, occupy, or cause to be built, constructed, placed, maintained or occupied (except in accordance with any by-law of the City, or except with the approval of and subject to such conditions as shall be determined by Council) in any street, any structure, object, substance, or thing which is an obstruction to the free use of such street, or which may encroach thereon, or lay or construct, or reconstruct any sidewalk on any street, without first obtaining therefore the written permission of the City Engineer.

A "street" is defined in s. 3 as including any lane and sidewalk.

[3] Section 571(1) of the Vancouver Charter provides:

> Any by-law passed hereunder may be enforced and the contravention of any regulation therein restrained by the Supreme Court upon action brought by the city, whether or not any penalty has been imposed for such contravention, and it shall be unnecessary for the Crown or the Attorney-General or any other officer of the Crown to be a party to such action.

[4] The area of the city where the Woodward's building is located is one where the streets are high volume traffic corridors and the sidewalks are busy pedestrian thoroughfares.

[5] The obstruction of the sidewalks began about 60 days ago after a number of people who had been living in the Woodward's building were forced to leave the premises. Much, if not most, of the sidewalk area on three sides of the building is covered by an overhanging structure that provides shelter for those who are now living on the street at that location. The evidence establishes, and indeed, it is generally conceded, that the tents, mattresses, and other belongings of those occupying the sidewalks constitute obstructions that contravene the by-law. Those who occupy the sidewalks are engaged in conduct that is unlawful.

[6] The occupancy of the sidewalks has given rise to concerns about public safety and sanitation. The evidence shows that much of the sidewalk area around the building is simply not available to be used by the public unimpeded. People are being attracted to join those occupying the sidewalks so that the numbers of those living around the building are increasing. In addition, garbage such as old furniture and furnaces that ought to be taken to disposal sites is now being dumped on the sidewalks.

[7] Three weeks ago, the City Engineer gave notice demanding that the obstructions on the sidewalks be removed. Since then, other efforts have been made to put an end to the

situation with little success. Those occupying the sidewalks have continued in their unlawful conduct.

[8] Now, in the discharge of its responsibilities to maintain the streets of the city clean, safe, and unobstructed, to be used by the public as intended, the City makes application to have its by-law enforced. It seeks an order that the obstructions be removed within two days time and that, until this action is tried, there be a prohibition against further obstruction of the sidewalks around the Woodward's building.

[9] Three of the defendants argue that the City has chosen the wrong form of relief. They point out that under s. 71(4) of the by-law, the City Engineer is authorized to remove the obstructions from the sidewalks. These defendants say that this is what should be done rather than the City obtaining an order that the obstructions be removed by those to whom they belong. It is said that discretion should be exercised in favour of enjoining the public at large from conduct prohibited by statute only if the Court is satisfied that intervention will produce a just result. Various authorities are cited as support for this proposition including: ***Everywoman's Health Centre Society (1988) v. Bridges*** (1990), 54 B.C.L.R. (2d) 273 (C.A.), ***MacMillan Bloedel Ltd. v. Simpson*** (1994), 96 B.C.L.R. (2d) 201 (C.A.), per Wood J.A. dissenting, ***Slocan Forest Products Ltd. v. Doe,*** [2000] B.C.J. No. 1592 (S.C.).

[10] However, while these and other cited authorities suggest that equitable injunctive remedies are, in some instances, either sought prematurely, or granted in circumstances where other more preferable remedies are available, they do not, in my view, support the contention that the City is precluded from pursuing its statutory remedy simply because of the authority given to the City Engineer. It is significant that the point is taken by only three of the defendants and that they are not supported by any of the others.

[11] The City contends that, where a statutory injunction is sought to prevent ongoing unlawful conduct, considerations that customarily relate to assessing the balance of convenience in respect of equitable injunctive remedies do not apply. In the absence of what can be said to be exceptional circumstances, the court will grant a statutory injunction on an interlocutory application. The City relies on authorities in which a municipality has sought injunctive relief to enforce a by-law, or where the Attorney-General has sought injunctive relief to enforce regulations: ***Maple Ridge (District) v. Thornhill Aggregates Ltd.*** (1998), 47 M.P.L.R. (2d) 249 (B.C.C.A.) and ***British Columbia (Minister of Forests) v. Okanagan Indian Band*** (1999), 37 C.P.C. (4th) 224 (S.C.), aff'd 187 D.L.R. (4th) 664 (B.C.C.A.).

[12] In ***Maple Ridge*** Cumming J.A., with whom Finch J.A. (now C.J.B.C.) agreed, said at para. 9:

> Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed.

[13] Cumming J.A. quoted from ***Saskatchewan (Minister of the Environment) v. Redberry Development Corp.***, [1987] 4 W.W.R. 654 (Sask. Q.B.); aff'd [1992] 2 W.W.R. 544 (Sask. C.A.) at 660 where it was said that once a clear breach has been established the court should only refuse the application in exceptional circumstances.

[14] The principle is one of longstanding. Much earlier, in ***City of Toronto v. Polai*** (1969), 8 D.L.R. (3d) 689 (Ont. C.A.), aff'd (1972) 28 D.L.R. (3d) 638 (S.C.C.), the same point was made by Schroeder J.A. What he said at pp. 696-97 is particularly germane to the City's application:

> As members of the city corporation the inhabitants are entitled to look to the duly elected representatives who comprise the municipal council for enforcement of the provisions of by-laws passed for their protection, and in enforcing those by-laws the corporation, whether by means of a prosecution or in a suit for injunctive relief, acts on behalf of all the inhabitants. The municipality, acting through its council and duly appointed officials, occupies in a more restricted sense the same position as does the Attorney-General who represents the Crown in its capacity as *parens patriae* charged with the responsibility of enforcing the rights of the public when they are violated. The decision whether or not the Attorney-General should prosecute or sue is a matter for him, and the Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief.
>
> The Attorney-General is in a different position from the ordinary litigant, for he represents the public interest in the community at large; when he intervenes to ask for relief the Courts should pay great heed to his intervention and only refuse relief in the most exceptional circumstances: *Atty-Gen'l v. Harris,* [1961] 1 Q.B. 75.

[15] Here, it is argued by the B.C. Civil Liberties Association that the wording of s. 571 renders that principle inapplicable to an application by the City, so that the court is said to be at liberty to exercise a broad discretion in determining whether to permit the unlawful conduct to continue. This is said to be so because, contrary to what the City maintains, s. 571 does not give the City discretion to enforce its by-laws through court intervention, but rather, vests in the court the discretion to grant an injunction. I see little merit in this point. In my view, the section serves the purpose for which the City contends but, in any event, it is not the wording of a provision for a statutory injunction that narrows the scope of the court's discretion. It is the fact that it is a statutory, as opposed to an equitable, injunction that is sought in the public interest. I consider the principles stated in ***Maple Ridge*** to be applicable to this application.

[16] The court is ultimately responsible for the administration of justice. Its task is to enforce the law which the people of this province are entitled to have enforced. Any discretion the court may have to permit unlawful conduct involving large numbers of people must be very narrow indeed and arise only in circumstances that are truly exceptional.

[17] The defendants say that there are exceptional circumstances that serve to defeat the City's application to put an end to the unlawful conduct. In the main, it is said that those who now occupy the sidewalks around the Woodward's building live in poverty. Many are unable to afford accommodation and are unable to find a place in any of the overnight shelters that are available to homeless people because the shelters are operating at capacity. The defendants say there is safety in numbers on the sidewalks and that those who are there now, and presumably others who may wish to join them, ought to be permitted to remain where they are indefinitely.

[18] Some of the defendants who appear are no longer occupying the sidewalks around the Woodward's building, while others have or could obtain accommodation or shelter if they wished. The evidence shows that the City has made and continues to make concerted efforts to find shelter for those who are on the sidewalks. Nonetheless, there is no doubt that there are many people there who do not have a better place to go.

[19] Poverty and the consequences of poverty are not, however, exceptional circumstances within the meaning that expression has been given. No authority can be cited that would support the contention that personal circumstances should permit the impoverished to engage in unlawful conduct so that the court should refuse the City's attempt to put an end to upwards of 200 people breaking the law. The governing authority is to the contrary.

[20] Examples of circumstances that could be said to be exceptional can be seen in the authority the City cites: ***British Columbia (Minister of the Environment, Lands & Parks) v. Alpha Manufacturing Inc. et al*** (1997), 150 D.L.R. (4th) 193 (B.C.C.A.) at para. 32 and ***Capital (Regional District) v. Smith*** (1998), 61 B.C.L.R. (3d) 217 (C.A.) at para 18. Exceptional circumstances might be found in instances where there was a right that pre-existed the enactment contravened, where there is a clear and unequivocal expression that the unlawful conduct will not continue, where there is such uncertainty that it can be said that the breach is not being flouted, or where the events do not give rise to the mischief the enactment was intended to preclude.

[21] Personal circumstances have, however, not been held to constitute circumstances that are sufficiently exceptional to justify unlawful conduct. Indeed, in ***British Columbia v. Okanagan Indian Band***, *supra,* at para. 60, personal hardship, poverty, and the need for timber for housing for community purposes were not considered exceptional circumstances sufficient to justify the court exercising its discretion in favour of denying an interlocutory statutory injunction pending determination of the validity of legislation that was said to have been contravened.

[22] Poverty and the consequences of poverty are serious social and political issues with which this, and other large cities in particular, must struggle. They are not, however, legal issues in the sense that they could constitute justification for the unlawful conduct of large numbers of people. The laws of this province and this city are to be obeyed by all. The personal hardship that may be suffered by those affected by the injunction being sought is, on the authorities that govern the exercise of this court's narrow discretion, outweighed by the public's interest in having the law enforced. There are no circumstances here that are sufficiently exceptional to justify the court's refusal to grant an injunction in favour of permitting the unlawful conduct of as many as 200 people, and perhaps more to come, to continue unabated.

[23] Could it be said that despite the City's responsibility to enforce the by-laws enacted for the public's orderly use of the streets and sidewalks in the city, the court ought to refuse to grant a statutory injunction the City seeks to bring an end to an obstruction of sidewalks in a busy part of the city that has persisted for two months and that is attributable to the unlawful conduct of large numbers of people? To ask that question must be to answer it.

[24] The defendants maintain that the City comes to court with less than "clean hands" in that, some weeks ago, the Vancouver Police took steps to remove the 40 people that were, at that time, occupying the sidewalks. They made arrests and they took and destroyed personal possessions including tents, mattresses, sleeping bags, food, and clothing. This, it is said, defeats the City's application for a statutory injunction because a party cannot seek equitable relief where it has itself committed a wrong in relation to the subject of the dispute: ***International Forest Products v. Kern et al*** [2000] B.C.S.C. 888 and [2000] B.C.S.C. 1141. However, as the City says, if the police acted wrongly, those affected have a remedy. The doctrine of clean hands ought not to be applied where the result would be to refuse a statutory injunction in which the public has a direct and substantial interest: ***City of Toronto v. Polai***, *supra*, at 697-98.

[25] The defendants then turn to the ***Canadian Charter of Rights and Freedoms***. They do not, on this application, seek to invoke the ***Charter*** to have the City's by-law or the applicable provisions of the ***Vancouver Charter*** struck or read down as being constitutionally invalid. Rather, they say that one or more of the sections of the ***Charter*** are engaged and that the court must exercise its discretion having regard for Charter values. They rely on authorities where it has been recognized that a court order, like an injunction, must comply with Charter requirements: ***Vancouver (City) v. Vancouver Municipal and Regional Employees' Union*** (1994), 118 D.L.R. (4th) 417 (B.C.S.C.) at para. 18 and ***BCGEU v. British Columbia (A.G.)*** (1988), 31 B.C.L.R. (2d) 273 (S.C.).

[26] The defendants and the B.C. Civil Liberties Association argue variously that the following sections of the ***Charter*** are engaged: s. 2(b), the freedom of expression; s.

2(d), the freedom of association; s. 7, the right not to be deprived of life, liberty, and security of person except in accordance with the principles of fundamental justice; and s. 15(1), the right to equality free of discrimination before the law.

[27] As I understand them, two or more of the defendants contend that the sections of the ***Charter*** that are engaged serve to completely defeat the court's discretion being exercised in favour of granting any injunction. They say that, even though the by-law is valid, the court cannot grant an injunction to stop the unlawful conduct that is the subject of its contravention because to do so would be inconsistent with Charter values. However, these defendants accept that no authority can be cited that would support the proposition that the ***Charter*** serves to render valid legislation unenforceable, and I do not consider the position they take merits further consideration.

[28] Other defendants appear to take much the same position as advanced by the B.C. Civil Liberties Association. It says that Charter values must be taken into account when exercising the court's discretion in determining the scope of the injunction the court may see fit to grant. The Association says that the injunction ought not to infringe upon the defendants' freedom of expression. It suggests that the terms of an order might permit the defendants to continue to occupy the sidewalks for a period of weeks or months but require that they guarantee a four-foot wide passage-way be maintained at all times for the use of the public. The defendants contend that the other sections of the ***Charter*** that are engaged lead to a similar limitation being imposed on any injunction to which the City is entitled.

[29] The Association relies on ***Committee for the Commonwealth of Canada v. Canada*** (1991), 77 D.L.R. (4th) at 385 (S.C.C.) as discussed by P.W. Hogg in his text ***Constitutional Law of Canada,*** vol. 2 (Toronto: Carswell, 2000 update) at 40.12 in support of the contention that s. 2(b) of the ***Charter*** does confer a right to use public property as a forum for expression purposes. The Association says that those occupying the sidewalks are using public property for that purpose. Indeed, it is evident that quite apart from those who have no better place to go, the occupation is being used to draw public attention to the plight of the impoverished.

[30] However, I do not consider that s. 2(b) of the ***Charter*** is engaged because, as Lamer C.J.C. said at pp. 394-95 in the case upon which the Association relies, individuals are only entitled to exercise their freedom of expression in public places if the form of the expression is compatible with the principle function or the intended purpose of the place. Obstructing the city's sidewalks in breach of its by-law is clearly not a form of expression that is compatible with the use of the sidewalks.

[31] I also do not consider that any of the other sections of the ***Charter*** that are raised are engaged. An injunction will not infringe the freedom of the individuals' association. It will only serve to require that their belongings that obstruct the sidewalks be removed. It could not be said that enjoining those on the sidewalks from continuing to occupy them unlawfully deprives anyone of the security of their person in a manner that conflicts with fundamental justice. Furthermore, there is no basis on which it can be said that the City is enforcing this, or any of its by-laws, in a manner that is discriminatory.

[32] Even if one or more of these several sections of the ***Charter*** were to be engaged and the applicable Charter values taken into account, they do not, in my view, lead to the imposition of an injunction that would permit the unlawful conduct of 200 people to continue for a period of weeks or months, even if the sidewalks were to be only partially obstructed. Any obstruction is unlawful.

[33] Were this a case where one person or a small group of people acknowledged that they were engaged in unlawful conduct, and that they were taking steps to bring it to an end shortly, there might be room for some accommodation sufficient to permit them to do so. Indeed, the City might well have been expected to agree. But this is a case where a large number of people are intent on continuing to break the law indefinitely. The

situation has continued for two months. The City gave notice and attempted to have the obstruction of the sidewalks removed three weeks ago to absolutely no avail. The City is concerned that more and more people are joining the occupation and that the numbers of those who are contravening the by-law will continue to grow. As it says, the tolerance of the unlawful conduct of some serves only to encourage others to break the law. The City has decided to act and applies for a remedy that the legislature of this province has seen fit to provide for the enforcement of its by-laws.

[34] I conclude that the City is entitled to the injunction it seeks and that, in keeping with the law that has long governed applications of this kind, the court must defer to the City's decision to proceed as it has seen fit.

[35] There will be an order substantially in the terms of the Notice of Motion save that, to be clear, the order will provide that what are described as the "Structures" shall be removed by noon on Monday, November 25, 2002. Subject to any comments counsel may have, the order will contain a direction that the City shall today distribute or post copies of the order and do so in a manner sufficient to ensure that it is brought to the attention of all who are currently occupying the sidewalks at the Woodward's building.

"P.D. Lowry, J."
The Honourable Mr. Justice P.D. Lowry

TAB 5

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Vancouver (City) v. Zhang,***
2009 BCSC 84

Date: 20090129
Docket: S065168
Registry: Vancouver

Between:

City of Vancouver

Petitioner

And

Sue Zhang, John Doe, Jane Doe, and Other Persons Unknown Erecting, Maintaining or Occupying Structures on City of Vancouver Street in the 3300 Block of Granville Street, Vancouver, British Columbia

Respondents

Before: The Honourable Madam Justice Stromberg-Stein

Reasons for Judgment

Counsel for the Petitioner: Tom Zworski

Counsel for the Respondents: Joseph J. Arvay, Q.C.
Clive Ansley

Date and Place of Hearing: November 3, 4, 5, 6 and 7, 2008
Vancouver, B.C.

[1] This is an application by the petitioner, the City of Vancouver ("the City"), for an injunction requiring the respondents to remove structures, consisting of a hut and a billboard (the "structures"), from a city street in front of the Chinese Consulate in the 3300 block of Granville Street, and prohibiting the respondents from placing any structures on any portion of the street. The City asserts that the structures were erected in contravention of s. 71 of the City of Vancouver, Revised By-law No. 2849, *Street and Traffic By-law* (the *"By-law"*). The City has directed the respondents to remove the structures but the respondents have refused. The City does not seek to enjoin the respondents from lawful picketing, protest or assembly on the street.

Background

[2] The respondents are practitioners of a spiritual discipline known as Falun Gong or Falun Dafa, which has its roots in ancient China. Persecution of Falun Gong adherents in China has been widely documented in numerous authoritative reports of the United Nations and international human rights organizations, as well as an international court. There are references to police harassment, summary arrest and imprisonment without charge, physical violence, torture, and killing to harvest organs.

[3] Commencing on August 20, 2001, Falun Gong practitioners in Greater Vancouver participated in a 300-hour relay sit-in hunger strike in front of the Chinese Consulate to support 130 Falun Gong practitioners who had been on a hunger strike in China. The Falun Gong practitioners set up cloth banners and a small makeshift shelter. This evolved into an around the clock protest vigil and is presently comprised of the following: a large billboard consisting of a wooden frame of two by two lumber supporting eight sheets of corrugated plastic, approximately eight feet high and 100 feet long, covered with posters, photographs of human rights abuses, and painted messages such as “Stop Killing”, “Tortured to Death”, “Prosecute Jiang Zemin and His Followers”, “Tortured for Belief – Over 100 Torture Methods”, and the website of the Falun Gong; a small meditation hut located beneath the mid-point of the billboard, approximately one metre by two metres in dimension, and covered with posters and writing; and persons who meditate in the hut, typically 24 hours a day, seven days a week. The respondents aim to bring awareness to the human rights abuses against Falun Gong practitioners in China by the posters and writing on the billboard and the meditation hut. Prominently displayed on the meditation hut is the message “PEACEFUL APPEAL DAY ____”, and a record of the number of days the protest vigil has been underway.

[4] Granville Street is a major street in Vancouver and a direct link between downtown Vancouver and the Vancouver International Airport. The structures are located on a small grassy portion of the City street which abuts the private property of the Chinese Consulate on one side, and the City sidewalk on the other. The billboard encroaches on the City street by 0.11 metres to 0.18 metres. The hut encroaches on the street by 0.95 metres. With the exception of a small portion of the hut (0.08 metres) and some supports for the billboard, the structures are located on the City street.

[5] The respondents do not dispute that they have placed and are maintaining the structures on the City street; that the structures encroach on the street; and that the respondents have not obtained written permission from the City Engineer to place or maintain the structures on the street. However, the respondents dispute that the structures obstruct the free use of the street since the structures do not obstruct the sidewalk area or interfere with pedestrian or vehicular traffic.

[6] The City initially raised no concerns about the vigil. Subsequently, the City raised safety concerns, along with concerns about liability and insurance. There have been no safety mishaps at the vigil site, and no concerns about litter, noise or disturbances. The City has received three documented complaints from the public over the entire duration of the vigil. One complaint came from a Consul General, representing all the Consul Generals in Vancouver, expressing concern that permitting the ongoing protest vigil in front of the Chinese Consulate raised the potential for safety concerns for their own consulates.

[7] Over the years, the City attempted to reach a satisfactory solution with the respondents. Initially the respondents co-operated by reducing, and at one time removing, the structures. However, the respondents now take the position that they have a right to maintain the structures in place notwithstanding s. 71 of the *By-law*.

[8] When Mayor Sullivan was elected in 2006, he wanted the permanent structures removed as part of his public order agenda. The evidence of the now former Mayor, which I accept, is that his wish to do so had nothing to do with the fact that the structures were in front of the Chinese Consulate or because of the sensitivities of the Chinese government. Rather, it was a public order issue concerning the integrity of the City’s by-laws. The concern was equity; that all groups be dealt with in the same way. City staff had always wanted to deal with the issue. The Mayor made it clear there was a political willingness to enforce the City’s by-laws. He had the support of Council which voted to proceed with enforcement of s. 71 and the matter was referred to legal counsel.

[9] The respondents never sought permission from the City to construct the permanent structures. The City has never considered whether to permit or to exempt the permanent structures.

Issues

1. Has there been a breach of s. 71 of the *By-law*?
2. Are there exceptional circumstances that disentitle the City to an injunction?
3. Is s. 71 of the *By-law* constitutionally valid?

i) Do the structures have expressive content such that they enjoy the protection of s. 2(b) of the ***Canadian Charter of Rights and Freedoms***, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11?

ii) If yes, does the method or location of the structures remove that ***Charter*** protection?

iii) If the structures are protected by s. 2(b), does s. 71 infringe that protection either in purpose or effect?

iv) If s. 71 does infringe s. 2(b) in either purpose or effect, is it reasonably justifiable pursuant to s. 1 of the ***Charter***?

4. Has the City used its powers under the *By-law* to act for an improper purpose?

Position of the City

[10] It is the position of the City that the evidence establishes an ongoing contravention of s. 71 of the *By-law*. The City submits that s. 71 is constitutionally valid and does not infringe the respondents' freedom of expression pursuant to s. 2(b) of the ***Charter***. The City says that construction of the structures by the respondents is not protected by s. 2(b) because they do not have expressive content. Even if they are held to constitute a form of expression, the method of expression is incompatible with the fundamental purpose of the City street. In the alternative, if the construction of the structures falls within the protection of s. 2(b), the City submits that s. 71 is a reasonable limit on freedom of expression that is prescribed by law and can be demonstrably justified in a free and democratic society. The City denies that it has used its powers under s. 71 improperly or that it has acted for an unconstitutional purpose to infringe the respondents' freedom of expression.

Position of the Respondents

[11] The respondents have given notice under the ***Constitutional Question Act***, R.S.B.C. 1996, c. 68, seeking a constitutional exemption from the application and enforcement of s. 71 of the *By-law*. They argue that s. 71 is unconstitutional because it infringes s. 2(b) of the ***Charter***. Further, the respondents argue that the City is enforcing s. 71 for the improper purpose of restricting their freedom of expression. They take the position that the structures and the protest vigil were tolerated in the beginning because of their message. Now, the respondents argue, they have been targeted to appease the Chinese government because their message is an irritant to trade relations and tourism.

The *By-law*

[12] The City is the owner in fee simple of all streets, which include sidewalks and boulevards, in Vancouver: ***Vancouver Charter***, S.B.C. 1953, c. 55, ss. 2, 289. The City has the authority to protect public streets from nuisances and encumbrances and to prohibit unauthorized encroachments and obstructions on the streets: ***Vancouver Charter***, ss.290, 291(d). Pursuant to that authority, the City has enacted various by-laws, including the *By-Law.* Part II of the *By-law* deals with regulation of the use of streets. Section 71, as relevant, provides:

STRUCTURES, ETC., NOT ALLOWED ON STREET

71. (1) No person shall build, construct, place, maintain, occupy, or cause to be built, constructed, placed, maintained or occupied (except in accordance with any by-law of the City, or except with the approval of and subject to such conditions as shall be determined by the Council) in any street, any structure, object, substance, or thing which is an obstruction to the free use of such street, or which may encroach thereon, or lay or construct, or reconstruct any sidewalk on any street, without first obtaining therefore the written permission of the City Engineer.

…

(4) The City Engineer is hereby authorized to remove any structure, object, substance or thing found in any street in contravention of this section and the costs incurred may be recovered by action in any Court of competent jurisdiction.

[13] Section 71 of the *By-law* is concerned with the orderly administration of public space for the benefit of the public at large and with balancing competing interests existing on that space. Streets provide the means for people to travel, but are also the primary means for delivery of municipal services and utilities. Streets are the preferred location for a variety of commercial and non-commercial activities, and are a traditional meeting place where individuals interact with each other for commercial or personal reasons. These uses compete and require constant and effective regulation. Such regulation is one of the primary functions of a municipality. As well, the City has a valid and important role in preserving the aesthetic appearance of streets through regulation of permanent encroachments: ***Canadian Newspapers* Co. v. Victoria (City)** (1989), 40 B.C.L.R. (2d) 297, 63 D.L.R. (4th) 1 at 4-5 (C.A.).

1. <u>Has There Been a Breach of the *By-law*?</u>

[14] Section 71 of the *By-law* prohibits construction of structures on City streets that obstruct the free use of the street or encroach upon the street. None of the exceptions to s. 71 in the *By-law* apply to the respondents' structures. The respondents concede in their oral submissions that the structures are on a street and that they encroach on the street. With this concession, the respondents admit they are in breach of s. 71.

[15] Either an encroachment or an obstruction is sufficient to establish a breach of s. 71. The City does not have to establish both. However, the City submits the structures also constitute an obstruction to the free use of the street.

[16] I agree with the City that it is not necessary that structures obstruct either pedestrian or vehicular traffic, as any obstruction is illegal, and the respondents' structures constitute an obstruction within the meaning of s. 71: ***Vancouver (City) v. Maurice***, 2002 BCSC 1421, at para. 32, 35 M.P.L.R. (3d) 276 [***Maurice (B.C.S.C.)***]. Streets constitute a finite public resource shared by a number of competing interests. The respondents' permanent structures occupy part of the street. That part of the street is no longer free for other uses while the structures are there. As such, the structures obstruct the free use of the street and it is not a defence to say that no other use for that part of the street has been suggested or contemplated.

[17] I conclude that there is a breach of s. 71 of the *By-law* as the permanent structures encroach on the City street and constitute an obstruction of the City street.

Injunctive Relief

[18] The City has authority to seek injunctive relief to prevent the ongoing contravention of s. 71: ***Vancouver Charter***, s. 334. When a public authority, such as a municipality, seeks injunctive relief to prevent the contravention of a law, the public interest in having the law obeyed will generally outweigh equitable considerations such as the balance of convenience and irreparable harm: ***Maple Ridge (District) v. Thornhill Aggregates Ltd.*** (1998), 54 B.C.L.R. (3d) 155, 162 D.L.R. (4th) 203 (C.A.). This is because the legislative authority is presumed to have taken into consideration the various competing interests of the public in enacting the legislation which is being contravened; the public has a direct and substantial interest in the enforcement of the law; and open defiance of the law constitutes irreparable harm to the public interest: ***British Columbia (Minister of Forests) v. Okanagan Indian Band*** (1999), 37 C.P.C. (4th) 224, B.C.J. No. 2545 (S.C.), aff'd 2000 BCCA 315, 187 D.L.R. (4th) 664; ***Attorney-General for Ontario v. Grabarchuk*** (1976), 11 O.R. (2d) 607, 67 D.L.R. (3d) 31 (Div. Ct.).

[19] Discretion to refuse an injunction to enforce public rights is limited to "exceptional circumstances": ***City of Toronto v. Polai*** (1969), [1970] 1 O.R. 483, 8 D.L.R. (3d) 689 at 697 (C.A.), aff'd [1973] S.C.R. 38, 28 D.L.R. (3d) 638; ***Vancouver (City) v. Maurice***, 2005 BCCA 37, 38 B.C.L.R. (4th) 385. Relevant factors in determining whether exceptional circumstances exist include the willingness of the party to refrain from the unlawful act; the fact that there may not be a clear case of "flouting" the law because the party has ceased the unlawful activity; and whether there is an absence of proof that the activity was related to the mischief the statute was designed to address: ***British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc.*** (1997), 150 D.L.R. (4th) 193, 96 B.C.A.C. 193.

2. <u>Are There Exceptional Circumstances?</u>

[20] The respondents suggest that the importance of their message, or the seriousness of their allegations, constitute exceptional circumstances. I do not agree that these constitute exceptional circumstances. Nor does

possible inconvenience to some of the respondents in terms of personal hardship constitute exceptional circumstances: ***Maurice (B.C.S.C.)***, at paras. 19-21.

[21] In their oral submissions, the respondents withdrew their argument that the City had allowed, acquiesced in, or tolerated the construction of the structures and is therefore estopped from enforcing s. 71 of the *By-law*. There is no dispute that the City tolerated the structures for some time before taking enforcement action. However, this is consistent with the City's general approach to public protests, which is to tolerate unauthorized temporary structures or objects on City sidewalks or boulevards if such objects are placed as part of a labour dispute or a protest and do not unduly obstruct or interfere with pedestrian or vehicular traffic. It was only once it became clear to the City that the respondents' structures were permanent, rather than temporary, that the City took enforcement action in accordance with its usual approach.

[22] The respondents maintain that there is nothing permanent about the structures, except that they have been in place for seven years. The structures are not intended to be permanent but to stand only for so long as the abuses of the Falun Gong by the Chinese government continue. The respondents also submit that the structures are not permanent in the sense that they can never be removed, as evidenced by the fact they were dismantled when the Chinese Consulate wanted to build a new fence.

[23] I agree with the City's submission that in the circumstances of this case, the structures have evolved from temporary to permanent structures. I note, however, that s. 71 of the *By-law* does not differentiate between temporary and permanent structures; it refers simply to "any structure … which is an obstruction to the free use of such street, or which may encroach thereon".

[24] The City's usual enforcement strategy, except in urgent cases, is to follow a progressive enforcement approach with a goal of voluntary compliance. This involves a dialogue with the party who is breaching a by-law to educate them about it and to attempt to achieve co-operation. If necessary, enforcement may be stepped up through the use of formal letters, orders, impoundment or legal proceedings. That is what happened in this case. The City initially tolerated what appeared to be a temporary protest in the form of the initial hunger strike and the canvas banners.

[25] With the transformation of the Falun Gong protest from its inception in July 2001 as a hunger strike with temporary fabric banners and signs, to the erection of permanent structures between 2001 and 2003, the City approached the respondents for the purpose of reducing and eliminating the unauthorized structures to achieve compliance with s. 71. The City met with the respondents in 2003. Initially the respondents agreed to reduce the size of the structures, and at one time removed them to allow the Chinese Consulate to construct a fence. In 2004 the City told the respondents that the structures contravened the by-laws. In 2005 the City again told the respondents to reduce the size of the structures but this time the respondents refused. In 2006 the Mayor asked the respondents to remove the structures and again the respondents refused. While the respondents initially co-operated with the City, they now refuse to reduce the size of the structures, move them, or remove them.

[26] This is a clear flouting of s. 71 by the respondents, who have expressed their intention to continue breaching s. 71. The activities of the respondents are clearly related to the mischief that s. 71 is intended to address. There are no exceptional circumstances which justify a refusal to grant an injunction sought by the City subject to a consideration of the ***Charter*** arguments.

3. <u>Is s. 71 of the *By-Law* Unconstitutional?</u>

Burden

[27] The burden rests on the respondents to establish that either s. 71 of the *By-law* or the City's enforcement of s. 71 infringes their constitutional rights.

Does s. 71 of the *By-law* infringe s. 2(b)?

[28] Section 2(b) of the ***Charter*** reads:

> 2. Everyone has the following fundamental freedoms:
>
> …
>
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> …

[29] Determining whether s. 71 infringes s. 2 (b) of the ***Charter*** requires answering three questions:

i) do the structures have expressive content thereby bringing them within s. 2(b) protection?

ii) if so, does the method or location of this expression remove the s. 2 (b) protection?

iii) if the expression is protected by s. 2(b), does s. 71 of the *By-law* infringe that protection either in purpose or effect?

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 978-979, 58 D.L.R. (4th) 577.

[30] McLachlin C.J.C. noted in ***Montr eal (City) v. 2952-1366 Quebec Inc.***, 2005 SCC 62, [2005] 3 S.C.R. 141 at para. 57, that the first two questions distinguish between content and form, a distinction that is useful where method and location are key to determining whether expression is protected by the s. 2(b) guarantee:

> 57 The first two questions related to whether the expression at issue in this case falls within the protected sphere of s. 2(*b*). They are premised on the distinction made in *Irwin Toy* between content (which is always protected) and "form" (which may not be protected). While this distinction may sometimes be blurred [citations omitted], it is useful in cases such as this, where method and location are central to determining whether the prohibited expression is protected by the guarantee of free expression.

i) Do the structures have expressive content?

[31] The position of the respondents is that the structures, like the tents erected on Parliament Hill in ***Weisfeld v. R.*** (1994), [1995] 1 F.C. 68, 116 D.L.R. (4th) 232 (C.A.), are integral to their expressive activity. They say that the nature of their expression is political, characterized by both acts and written words. They maintain that the protest vigil, including the structures, is an integral component of expressive content, a "physical gesture" and one of the "infinite variety of forms of expression" described in ***Irwin Toy*** at pages 968-970. They argue their expressive activity has symbolic significance insofar as it is in front of the Chinese Consulate, on the main route between the airport and downtown. They deem it to be the most effective way to convey the message of the Falun Gong. Without the structures, which the respondents say evidences the longevity, consistency and persistence of the protest, the expressive content of the message will be altered. They argue that the hut houses the person meditating and sends a powerful message that these are peaceful people who meditate, and that because of this the Chinese government persecutes, tortures and murders their members.

[32] The City's position is that the structures do not fall under s. 2(b) protection and the respondents are therefore not entitled to a constitutional exemption from the *By-law*. It is the position of the City that neither s. 71 nor its enforcement infringes the respondents' constitutional rights because both s. 71 and the injunction application are directed at the unlawful construction of structures on public property, not at constitutionally protected expressive activity. Relying on ***Cheema v. Ross*** (1991), 82 D.L.R. (4th) 213, 2 B.C.A.C. 92, the City submits that the structures are not a form of expression but are merely "props" to assist the respondents. The billboard, for instance, does not itself convey any meaning; rather, it facilitates the display of posters, pictures, and signs. This function does not transform the billboard into expressive content. Similarly, even if it can be said that the act of meditation represents a form of expression, the meditation hut itself does not convey any meaning but simply makes the vigil participants more comfortable.

[33] The issue before the Supreme Court in ***Irwin Toy*** was whether advertising aimed at children fell within the scope of freedom of expression. In considering what constitutes "expression", the majority wrote at 968-970:

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

> . . . is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2*(b)* challenge would proceed.

> The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection.

[34] ***Weisfeld*** concerned a peace camp erected on Parliament Hill to protest cruise missile testing. One of the questions before the Court was whether the camp amounted to expressive activity protected under s. 2(b). The Court considered and applied ***Irwin Toy***, and went on to find at 243-244 that expression went beyond words and included the “props” used to convey meaning:

> … The act of private citizens building a very visible structure on the grounds of Parliament Hill, as well as maintaining a vigil there for more than two years, certainly conveys some kind of meaning. Similar peace camp protests were used in other countries at that time. This camp was meant to link up with other similar protests. The structure itself, therefore, helped to dramatize the message the appellant was seeking to communicate. It also manifested the protestors' commitment to the cause.

> In my view, expression goes beyond words. People may choose to amplify or dramatize their messages in many ways: a sandwich board, a soapbox, a megaphone, a flag, a banner, a placard, a picture, a petition, all can be used to convey a message or to assist one in conveying a message more effectively. These "props" are part and parcel of the manner in which one chooses to express oneself and are as deserving of protection as the words used to convey the meaning. The peace camp structures and the tables used are, therefore, included in the concept of expression.

[35] In ***Cheema***, the plaintiff used sound amplification equipment to voice political views outside a reception for the Indian Consul, in violation of a noise by-law. Toy J.A. said this at 222:

> Therefore, the assessment of whether a person's freedom of expression has been infringed requires a three-step analysis:
>
> (1) Firstly, an examination of the impugned activity;
>
> (2) Secondly, an examination of the purpose of the legislation; and
>
> (3) Finally, an examination of the effect of that legislation on the person who is indulging in the activity.

> I will start with a consideration of the first step. What the plaintiff was doing can best be described as voicing his political views, alleging, through the medium of sound amplification, inhumane conduct on the part of the government of India and some of its agencies.

> A consideration of the second step leads me to conclude that the anti-noise by-law is intended to provide citizens with some measure of protection from excessive noise; whether it be noise which is offensive to one's ears or, as counsel for the plaintiff has so aptly submitted, the sound of Handel's Messiah. I do not detect anything in the by-law which suggests that it is aimed at restricting those who are so minded from exercising their right to peaceful, public persuasion. Nor do I detect any suggestion of an oblique motive behind the passage of this particular by-law.

> Finally, I turn to the third step: an assessment of the by-law's effect on the plaintiff, taking into consideration the fashion in which the police force chose to enforce it. The police took the sound amplification system away from the plaintiff, but the demonstrators were allowed to continue with their protest for as long as they chose to do so. Of what then was the plaintiff deprived? Counsel for the plaintiff was unable to articulate any deprivation except to characterize the restriction on the plaintiff as an act of suppression aimed at delegitimizing the content of his message.

[36] The "prop" in ***Cheema*** was quite unlike those used in ***Weisfeld***.

[37] In the present case, the protest vigil, which includes the structures, cannot be distinguished from the peace camp in ***Weisfeld***. The Court there specifically found that the act of a citizen building a camp on Parliament Hill and maintaining it for over two years conveyed a message that had expressive content. Similarly, the billboard with the posters and messages affixed to it, and the hut, which provides shelter for the meditation vigil and is also covered in posters and messages, can be said to be props that amplify or dramatize the respondents' protest vigil. This vigil has been in place in one form or another for seven years, and manifests "the protestors' commitment to the cause" and, hence, the message of the Falun Gong. As such, I conclude that the respondents' protest vigil, including the structures, is expressive content within the meaning of s. 2(b).

ii) Does the method or location of the expression exclude s. 2(b) protection?

[38] The respondents submit that Supreme Court of Canada jurisprudence recognizes streets as acceptable and appropriate venues for public expression: see, for instance, ***Montreal (City)*** and ***Committee for the Commonwealth of Canada v. Canada***, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385. Their protest vigil, which occupies only a very small portion of a City street, is thus being conducted in a place that has been recognized as a venue for the expression of ideas, thoughts and opinions. The respondents say that their expression promotes the values advanced by s. 2(b) – democratic discourse, truth finding and self-fulfillment – and that there is nothing in its method or location that undermines these values in any way so as to remove it from the scope of s. 2(b) protection.

[39] The City argues that even if the structures have expressive content, their form contravenes the function of the public street and thus removes them from the protection of s. 2(b): ***Committee for the Commonwealth; Montreal (City)***. The City submits that a prohibition against placement of objects and structures on streets does not constitute an infringement of the freedom of expression: ***Canadian Newspapers***.

[40] To come within the ambit of s. 2(b), expression must not only be consonant with ***Charter*** values but must also be compatible with the function of the place, as described in ***Committee for the Commonwealth*** at 156-157:

> Having reviewed the interest at issue, I come to the conclusion that s. 2*(b)* of the *Charter* cannot be interpreted so as to consider only the interests of the person wishing to communicate. As the Attorney General for Ontario properly points out, s. 2*(b)* of the *Charter* does not protect "expression" itself but <u>freedom</u> of expression. In my opinion, the "freedom" which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.
>
> …
>
> The fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are always circumscribed by the rights of others. In the context of expressing oneself in places owned by the state, it can be said that, under s. 2*(b)*, the freedom of expression is circumscribed at least by the very function of the place.
>
> [Emphasis in original]

[41] At issue in ***Montreal (City)*** was the authority of the City of Montreal to prohibit noise in the street produced by a loudspeaker located at the entrance to a club in a commercial area of the City. In considering whether the noise emitted by the loudspeaker was protected by s. 2(b) of the ***Charter***, McLachlin C.J.C. discussed the three questions from ***Irwin Toy*** I referred to earlier in these reasons, at para. 29.

[42] McLachlin C.J.C. found that the noise had expressive content, thereby bringing it within the s. 2(b) protection. In considering whether the noise was protected by 2(b), she wrote at para. 60:

> 60 Expressive activity may fall outside the scope of s. 2(*b*) protection because of how or where it is delivered. While all expressive *content* is worthy of protection (see *Irwin Toy*, at p. 969), the *method or location* of the expression may not be. For instance, this Court has found that violent expression is not protected by the *Canadian Charter*: *Irwin Toy*, at pp. 969-70. Violence is not excluded because of the message it conveys (no matter how hateful) but rather because the method by which the message is conveyed is not consonant with *Charter* protection.
>
> [Emphasis in original]

[43] Though private property is excluded from s. 2(b) protection, and generally government property (which is publicly owned) is not excluded, McLachlin C.J.C. went on to allow, at paras. 64-65, that s. 2(b) protection may not be extended to all publicly owned property, particularly where the use of the public property is essentially private:

> 64 The argument against s. 2(*b*) protection on at least some government-owned property, by contrast, focuses on the distinction between public use of property and private use of property. Regardless of the fact that the government owns and hence controls its property, it is asserted, many government places are essentially private in use. Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. But other areas, like private offices and diverse places of public business, have never been viewed as available spaces for public expression. It cannot have been the intention of the drafters of the *Canadian Charter*, the argument continues, to confer a *prima facie* right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expressions from places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public.
>
> 65 In *Committee for the Commonwealth of Canada*, six of seven judges endorsed the second general approach, although they adopted different tests for determining whether the government-owned property at issue was public or private in nature. Lamer C.J., supported by Sopinka and Cory JJ., advocated a test based on whether the primary function of the space was compatible with free expression. McLachlin J., supported by La Forest and Gonthier JJ., proposed a test based on whether expression in the place at issue served the values underlying the s. 2(*b*) free speech guarantee. L'Heureux-Dubé J. opted for the first approach and went directly to s. 1.

[44] McLachlin C.J.C. held that on any of the three tests set out in ***Committee for the Commonwealth***, the emission of noise onto a public street was protected by s. 2(b). The activity was expressive, and the evidence did not establish that the method and location in question – a building-mounted amplifier emitting noise onto a public street – impeded the function of city streets or failed to promote the values that underlie the freedom of expression.

[45] McLachlin C.J.C., in *dicta*, then clarified the appropriate approach to the issue of expression on public property, beginning at para. 71-72:

> 71 We agree with the view of the majority in *Committee for the Commonwealth of Canada* that the application of s. 2(*b*) is not attracted by the mere fact of government ownership of the place in question. There must be a further enquiry to determine if this is the *type* of public property which attracts s. 2(*b*) protection.
>
> 72 Expressive activity should be excluded from the protective scope of s. 2(*b*) only if its method or location clearly undermines the values that underlie the guarantee. …
>
> [Emphasis in original]

[46] At para. 74, she proposed the following test for determining whether s. 2(b) applies to public property, as adopted from ***Committee for the Commonwealth***, with the onus resting upon the claimant:

> 74 The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and

(b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

[47] McLachlin C.J.C. expanded upon these factors at paras. 75-77:

> 75 The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2*(b).* In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.
>
> 76 Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space — the activity going on there — compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.
>
> 77 Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. …

[48] Applying this approach to the facts in question, McLachlin C.J.C. found that the expression fell within the protected sphere of s. 2(b):

> 81 The content, as already noted is expressive. Viewed from the perspective of locus, the expression falls within the public domain. Streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties have long been accepted. There is nothing to suggest that to permit this medium of expression would subvert the values of s. 2*(b).*

[49] I turn now to the facts of the present case.

[50] The protest vigil, which includes the structures in question, abuts private property in what is essentially a residential area. Nevertheless, the structures are on a street, and as McLachlin C.J.C. wrote at para. 81 of ***Montreal (City)*** "streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties have long been accepted". However, in my view, the particular method or form of expression at issue on this petition, namely the erection of permanent structures, is incompatible with the fundamental purpose of the street.

[51] Streets serve many functions, key among them being to facilitate the movement of pedestrians and vehicles. They can also be used as locations for demonstration and protest. However, the erection of permanent structures on a street to assist in any such activities is incompatible with the principal function of the street.

[52] In my view, s. 2(b) protects the ability of the respondents to convey their message on the public street outside the Chinese Consulate using methods of expression that are compatible with the function of the street. Some of those methods may include the carrying of signs and placards, and peaceful meditation. The construction of permanent structures at that location to facilitate their expressive activity, however, falls outside the protected sphere of s. 2(b).

[53] I conclude that the method of the respondents' expression, insofar as it involves the structures, is excluded from the protection of s. 2(b). I emphasize that I am referring here only to the billboard and the hut; the other methods of expression employed by the respondents in their protest vigil are not excluded from the ambit of s. 2(b).

[54] It follows from this conclusion that s. 71 of the *By-law*, which requires the respondents to express themselves by means that do not involve the structures, does not restrict the respondents' expressive freedom under the ***Charter***.

[55] In the event that I am incorrect in this conclusion, I will proceed with the analysis on the assumption that the expression in question is protected by s. 2(b).

iii) Does s. 71 of the *By-law* impinge on the protected expression in purpose or effect?

[56] If the expression in question is protected by s. 2(b), it then becomes necessary to consider whether s. 71 of the *By-law* infringes that expression in either purpose or effect.

[57] As I indicated earlier in these Reasons, s. 71 is concerned with the orderly administration of public space for the benefit of the public at large. Its purpose is to control the physical consequences of obstructing or encroaching structures or objects, regardless of whether they have expressive content. As such, s. 71 is content neutral and its purpose is benign.

[58] However, as McLachlin C.J.C. explained at para. 83 of ***Montreal (City)***, a breach of s. 2(b) will also be made out where the effect of a provision is to limit expression, provided that the claimant demonstrates that the expression at issue promotes one of the values underlying the freedom of expression. As set out in ***Irwin Toy*** at 976, those values are: (1) the seeking and obtaining of truth; (2) participation in social and political decision-making; and (3) self-fulfilment.

[59] The respondents assert that the expressive content of the protest vigil, including the associated billboard and posters, furthers political discussion and truth surrounding the persecution of and human rights abuses against Falun Gong members in China. In this regard, the expressive content clearly promotes the values of seeking and attaining the truth, and participation in social and political decision-making. The respondents further submit that in endeavouring to educate and promote social awareness, the vigil also advances the self-fulfillment of members of the Falun Gong and other observers of the protest. Enforcement of s. 71 of the *By-law*, they say, will have the effect of transforming and reducing both the expression conveyed and its effectiveness.

[60] I accept that the protest vigil promotes the values underlying s. 2(b) as asserted by the respondents. As enforcement of s. 71 of the *By-law* will have the effect of preventing the respondents from expressing themselves in the manner of their choice, I would conclude that s. 71 constitutes a limit on their expressive freedom under s. 2(b) of the ***Charter***.

Is s. 71 of the *By-law* reasonably justifiable pursuant to s. 1 of the *Charter*?

[61] Since the *By-law* has the effect of infringing the respondents' protected expression, it is necessary to turn to s. 1 of the ***Charter***, which provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[62] In order for s. 71 of the *By-law* to be saved under s. 1 of the ***Charter***, the onus rests upon the City to demonstrate that the provision is directed at an objective that is pressing and substantial, and that its limit on expression is proportionate in the sense of (a) being rationally connected to the objective, (b) impairing the right to expressive freedom in a reasonably minimal way, and (c) having an effect in terms of curtailment of the right that is proportionate to the benefit sought: ***R. v. Oakes***, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

[63] With respect to the objective, the City stresses that s. 71 is not traditional prohibitory legislation which pitches the state against the individual. Rather, it is part of a regulatory scheme by which the City endeavours to administer public space for the benefit of the public at large and balance the competing individual interests that exist with respect to such space. Thus, the purpose of s. 71 is to manage and regulate the use of City streets by prohibiting the construction of structures thereon that either obstruct the free use of the street or encroach upon it. The City submits that s. 71 of the *By-law* also preserves the aesthetic appearance of City streets through the regulation of permanent encroachments. These, it says, are pressing and substantial objectives.

[64] I agree that regulating City streets to keep them clear of obstructions and encroachments is a pressing and substantial objective.

[65] Without such regulation, one could foresee, for instance, the uncontrolled proliferation of permanent structures advertising messages of choice along Granville Street (which is primarily a residential street with the exception of two small commercial areas), with a rush to occupy the prime locations. The effect would not only be an aesthetic disaster but, more importantly, the presence of obstructions and encroachments could cause injury or, at a minimum, inconvenience to other users of the street. Furthermore, construction of permanent structures on City streets amounts to expropriation of public space for private use: ***Canadian Newspapers*****,** at 17. Such permanent occupation by an individual or a group is incompatible with the very nature of public space which, although vested in the City, belongs to the public as a whole.

[66] Accordingly, I find that s. 71 of the *By-law* has a pressing and substantial objective.

[67] I turn next to consider the proportionality of s. 71.

[68] The first stage of this part of the justification analysis requires a consideration of whether s. 71 is rationally connected to its objective of maintaining City streets free from obstructions and encroachments. This stage is easily disposed of, as s. 71 is quite clearly designed to achieve that objective by presumptively prohibiting obstructing or encroaching structures on City streets.

[69] The second proportionality inquiry asks whether s. 71 of the *By-law* infringes freedom of expression to the minimal extent possible.

[70] At para. 94 of ***Montreal (City)***, McLachlin C.J.C. made the following comments in her discussion of minimal impairment:

> 94 First, in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way. This is particularly so on environmental issues, where views and interests conflict and precision is elusive: *Canadian Pacific*.

[71] Section 71 of the *By-law* contains a general prohibition on the construction on City streets of structures which either obstruct the free use of the street or encroach upon it. The prohibition is not absolute since it is subject to exceptions permitted by other by-laws or as approved by the City. The authority of the City Engineer to permit obstructions or encroachments is governed by those by-laws and policies. Objects such as newspaper boxes, bus shelters, bike racks, outdoor cafes, and fruit stands, for example, are exempted by by-laws or policies, and permitted on City streets.

[72] While there is nothing specifically in place to evaluate or permit political expression that encroaches or obstructs on City property, it is important to keep in mind that s. 71 of the *By-law* does not impose a ban on political expression; it simply prohibits the unregulated construction of structures. Accordingly, with respect to the respondents' protest vigil, s. 71 of the *By-law* does not prohibit the respondents from continuing their protest whether by carrying signs and posters or engaging in peaceful meditation. Their protest can continue with equal effectiveness, albeit with some inconvenience, without the structures. Section 71 only restricts one aspect of the respondents' expression; it does not interfere with the other means by which the respondents are communicating their message.

[73] Therefore, I would find that s. 71 is minimally impairing of the respondents' expressive freedom.

[74] The last stage of the proportionality analysis requires a consideration of whether the salutary effects of s. 71 of the *By-law* outweigh its prejudicial effects. As is apparent from the foregoing, it is my view that this balancing supports the conclusion that s. 71 is justifiable under s. 1 of the ***Charter***.

[75] Section 71 of the *By-law* regulates and accommodates competing uses of City streets by presumptively prohibiting the construction of structures that obstruct or encroach upon them. The expression that is limited by s. 71 in the present case consists of a billboard and hut. Beyond prohibiting these structures, s. 71 does not stifle the respondents' expressive freedom. It does not prevent the respondents from conveying their message at the location of their choice, and simply requires them to do so in a manner that is compatible with the primary function of the street. In my view, therefore, the beneficial effects of s. 71 outweigh its prejudicial effects.

[76] I would conclude that s. 71 of the *By-law* is justifiable under s. 1 of the ***Charter*.**

4. <u>Has the City used the *By-law* to act for an improper purpose?</u>

[77] The respondents submit that in enforcing s. 71 of the *By-law,* the City has failed to exercise its discretion, or has fettered its discretion, and thereby has abused its power. They argue that the City's motivation in acting to enforce s. 71 of the *By-law* is in fact the structures' message, which is causing problems between China and the federal and provincial governments. The respondents say that the City is acting to enforce s. 71 due to pressure and influence directly or indirectly from the Chinese government because the political nature of the expression offends the Chinese government.

[78] The respondents allege that the City has improperly used its powers under s. 71 to restrict their freedom of expression. Relying on ***Roncarelli v. Duplessis***, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, the respondents assert that the City has not acted in good faith. They also cite ***Anderson v. Regan*** [1990] B.C.J. No. 520 (S.C.) and suggest that there is a body of circumstantial evidence which taken together supports the conclusion on a

balance of probabilities that the City is acting in bad faith, although each piece of evidence on its own does not warrant the conclusion.

[79] The City submits that the respondents have not and cannot prove their allegations because many of the so called “incontrovertible facts” on which they rely are inaccurate, and all relevant evidence taken into consideration demonstrates that the City acted in good faith and in a manner consistent with its usual practice.

[80] There are a number of facts either admitted or supported by the evidence. The Chinese government has declared war on Falun Gong. The Chinese Consulate in Vancouver has made it known to the federal and provincial governments that they are unhappy with the Falun Gong vigil. Although there is no evidence that the Chinese Consulate has communicated this directly to the City, the City has been well aware of its unhappiness. The City began its campaign to reduce and remove the vigil in 2003, at a time when the permanence of the vigil had become obvious, and initially the respondents’ cooperated. This was prior to the City receiving the October 13, 2004 letter from the Department of Foreign Affairs and International Trade, indicating that the Chinese government had registered a complaint about the vigil. Federal and provincial government officials privately and publicly complained over the years that the vigil impaired the dignity of the Chinese Consulate; that it might conflict with treaty obligations and the Vienna Convention, as there is a duty to protect the dignity of diplomatic missions and foreign officials; that it was an irritant to trade negotiations; and that it was not helpful, or was a bar, to promoting better trade relations with China.

[81] City staff met with the respondents in 2005 and suggested a compromise to reduce the size of the vigil because of its location in front of a private property, but the respondents rejected any compromise. The decision to instruct counsel to seek an injunction was made by Council in May 2006 at the initial insistence of then Mayor Sullivan. Mayor Sullivan maintained that the decision was made without any considerations other than that the vigil violated s. 71 of the *By-law* and that s. 71 should apply equally to everyone. City staff voiced concerns that the vigil was inappropriate and unsightly. This was at a time when the province was engaged in a trade mission to China and an important objective of both the federal and provincial governments was to obtain Approved Destination Status (“ADS”) which would allow Chinese citizens to travel freely to Canada - an obvious benefit for tourism. The Falun Gong vigil was considered at least one obstacle to the granting of ADS, which has not been granted to this day.

[82] The Mayor did not wish to meet with anyone from the Chinese Consulate prior to a decision about the vigil, in order to avoid an impression that he was being influenced by the Chinese Consulate. The Mayor regularly met with various Consuls General, however, and in October 2007, the Mayor was approached by a delegation of Consuls General who were concerned that similar protests could be erected in front of their consulates. The Mayor met with the Chinese Consul General on at least two occasions after May 2006. The Mayor took the initiative to tell the Chinese Consul General about this legal proceeding, which was the only City business discussed. This meeting took place six weeks before Humphries J. dismissed the respondents’ application to transfer the petition to the trial list. The Chinese Consul General visited City Hall in August 2008. One month after Myers J. denied adjournment of this petition, Mayor Sullivan met again with the Chinese Consul General at City Hall. This meeting occurred two days before a press conference given by the Chinese Consul General where he is reported to have said that his one regret was the Falun Gong vigil had not been taken down. He was also reported saying that he had expressed his concerns to the local government but it still had not been taken down.

[83] This Court must consider all relevant evidence, not just the evidence relied on by the respondents. The totality of relevant evidence clearly refutes the respondents’ position that the City has acted for the improper purpose of silencing the message at the behest of the Chinese government.

[84] For example, an e-mail written by Tom Hammel, Streets Administration Engineer, dated November 3, 2003 to one of the three persons who had complained about the protest vigil, summarized the City’s position with respect to the vigil (including the structures) as follows:

> In considering the right to protest, our main concern is to ensure the safety and convenience of the public is not compromised. This means we have to consider whether there is an infringement of the rights of the public to travel on sidewalks and streets that are clear of obstructions and harassment from protesters. We also need to consider whether the placement of signs and other items creates a potential safety hazard to the public. In the case of the Falun Gong protest, we have been observing the situation closely over the past couple of years and have had discussions with members of the group. To date, the protesters are not obstructing pedestrian use of the sidewalk, interfering with vehicle traffic on the road, litter (sic) the neighbourhood or causing a noise disturbance. The protesters have cooperated with us in minimizing the extent of their signing. Since the protest is taking place in a safe and peaceful manner, we see no reason to take any action at this time. The right to express a difference of opinion is a cornerstone of democracy

> and is guaranteed by the Canadian Charter of Rights and Freedoms. Therefore, while we appreciate that you are not happy with the current situation, we are obligated to respect the right to peaceful assembly that all Canadians are entitled to.

[85] Mr. Hammel's email, on behalf of the City, properly recognized the right of the Falun Gong to protest as "a cornerstone of democracy" "guaranteed by the Canadian Charter of Rights and Freedoms"; and in conjunction with public safety and convenience, the City acknowledged it was "obligated to respect the right to peaceful assembly that all Canadians are entitled to".

[86] The City regularly refrains from enforcement to permit temporary protests which do not unduly interfere with streets. The City initially took the same approach to the respondents' structures. The City employed a progressive enforcement approach and commenced its first "soft" enforcement in relation to the respondents' structures in 2003 once it concluded that the structures were permanent. The City never interfered with or impeded any other protests or demonstration activities of the respondents. Although authorized by s. 71 of the *By-law*, the City did not remove the structures, preferring to take this longer legal route instead to obtain an injunction. The City did not hide or deny that it had received complaints from the federal and provincial governments. There is nothing to suggest that the City's conduct in this matter has been either inconsistent with its usual practice or motivated by an improper purpose.

[87] The respondents assert the City must have acted under pressure from the Chinese government because the Chinese government has been known to pressure other governments in this way. Accordingly, the respondents believe that this must have also happened in Vancouver. However, this is speculative, at best, and there is simply no evidentiary basis to support the respondents' assertion that they are the target of a propaganda campaign waged by Chinese officials to exert political and economic pressure on the federal and provincial governments, resulting in the City acting for an improper purpose in enforcing s. 71 of the *By-law*. I find there is no evidence the City has acted for an improper purpose in seeking to enforce s. 71.

Conclusion

[88] The respondents have breached and are continuing to breach s. 71 of the *By-law* by the construction and maintenance of their permanent structures on a City street in a manner that obstructs the free use of the street and encroaches on the street. There are no exceptional circumstances to prevent the enforcement of s. 71.

[89] The protest vigil has expressive content. However, the method of the respondents' expression, insofar as it involves the structures, is incompatible with the fundamental purpose of the street and is therefore excluded from the protection of s. 2(b) of the ***Charter***. In the event I am wrong in this regard, I would have found that s. 71 of the *By-law* has the effect of infringing the respondents' expressive freedom but that it is justifiable under s. 1 of the ***Charter***.

[90] The City is not acting for an improper purpose. Therefore, the City is entitled to the orders sought in the petition.

1. The respondents and all other persons having knowledge of this order remove all structures owned, constructed, maintained, or occupied by them which are located upon City of Vancouver street, or any part thereof, in the 3300 block of Granville Street, Vancouver, British Columbia by noon on the seventh day after the date of this order.
2. The respondents and all other persons having knowledge of this order be prohibited and restrained from constructing, placing, or maintaining structures upon City of Vancouver street, or any part thereof, in the 3300 block of Granville Street, Vancouver, British Columbia, without having first obtained written consent from the City Engineer.
3. This injunction order does not prohibit or limit the right of the respondents, or any other persons, to lawfully assemble on any street or any part thereof.

[91] In the normal course, the successful party, the City, is entitled to costs. If the parties cannot resolve the issue of costs, they may provide written submissions within 30 days of the date of this judgment.

"The Honourable Madam Justice Stromberg-Stein"

TAB 6

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Peachland (District) v. Peachland Self Storage Ltd.,* 2011 BCCA 466

Date: 20111117
Docket: CA039303

Between:

The Corporation of the District of Peachland

Respondent
(Plaintiff)

And

Peachland Self Storage Ltd.

Appellant
(Defendant)

Before: The Honourable Mr. Justice Chiasson
(In Chambers)

On appeal from: Supreme Court of British Columbia, July 29, 2011,
(*Peachland (District) v. Peachland Self Storage Ltd.*, Vancouver No. S105503)

Counsel for the Appellant:	B.J. Greenberg
Counsel for the Respondent:	S.S. Manhas
Place and Date of Hearing:	Vancouver, British Columbia November 8, 2011
Place and Date of Judgment:	Vancouver, British Columbia November 17, 2011

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] The applicant, Peachland Self Storage Ltd., has applied for leave to appeal and for a stay of the order of Madam Justice Fitzpatrick granting an injunction restraining the applicant from removing more than 200 m³ of soil from land it owns in the respondent District. Because it is not removing soil presently and will not do so until April 2012, the application for a stay was adjourned generally.

Background

[2] The applicant is the successor to a corporation that applied in June 2007 for a permit from the Provincial Ministry of Energy, Mines and Petroleum Resources allowing a temporary gravel extraction operation in the District. The operation was intended to allow the applicant to prepare the site for

development and to provide a source of funding for a proposed light industry complex. At the time of the application for the mines permit, there was no limit in the District on the volume of soil that could be extracted or deposited. In September 2007, the District amended its Earthworks Bylaw to limit extraction or deposit to 200 m³ per year.

[3] If a bylaw amendment prohibits extraction, ministerial approval is required (*Local Government Act*, R.S.B.C. 1996, c. 323, s. 723 and *Community Charter Act*, S.B.C. 2003, c. 26, s. 9). The District did not obtain approval of the amended bylaw.

[4] On October 14, 2009, the mines permit was issued. It authorized the applicant to remove 100,000 m³ of material per year and included a requirement that the applicant build a berm around the site as a measure to mitigate potential visual or noise impacts. Construction of the berm required 800 m³ to 1200 m³ of material. Using soil excavated from one of its other properties, the applicant undertook construction of the berm in 2010 to comply with the permit requirement.

[5] The District brought these proceedings by Petition in August 2010. It sought a declaration the activities of the applicant contravened the amended bylaw and an injunction restraining the applicant from continuing. The proceedings were converted to an action on October 13, 2010. The applicant's position is that the amended bylaw is not valid because it did not receive ministerial consent, conflicts with the mines permit and is a colourable attempt to interfere with the applicant's planned activities.

[6] In February 1010, the District gave second and third reading to a new bylaw, which was submitted to the Ministry of Community and Rural Development for approval because the bylaw imposes a fee. The new bylaw authorizes extraction and deposit of 100,000 m³ of soil per year. Formal approval of the bylaw has not been obtained, although the District has been informed unofficially that approval will be forthcoming.

[7] Some pre-trial proceedings took place until a stand-still agreement was reached. This agreement expired in June 2011. On July 26, 2011, the applicant began to remove soil in excess of 200 m³. The District obtained the subject injunction on July 29, 2011.

<u>The chambers decision</u>

[8] The chambers judge noted that the parties agreed that what was in issue was the granting of an interlocutory, statutory injunction; that is, an injunction authorized by s. 274(1)(a) of the *Community Charter*. Pursuant to s. 274(3):

> The authority under subsection (1) is in addition to any other remedy or penalty provided under this Act or the *Local Government Act* and may be exercised whether or not a penalty has been imposed for the contravention.

[9] The parties also agreed that the test to be applied was whether there had been a clear breach of the by-law and referred the chambers judge to *Vancouver (City) v. Maurice*, 2005 BCCA 37, [2005]

B.C.J. No. 96, which held at para. 34 that once a clear breach is shown, “the courts will refuse an injunction to restrain the breach only in exceptional circumstances”.

[10] The chambers judge stated the position of the applicant at para. 5:

> The defendant has raised certain defences to the amended bylaw by which it contends that the amended bylaw is invalid and as such unenforceable by the District. The first defence is that the amended bylaw is prohibitory rather than regulatory. This is a significant point given the provisions of the *Community Charter,* which provide that a prohibition by the District requires the consent of the Minister and it is conceded that no such consent to the amended bylaw has been obtained by the District. The second defence is that the amended bylaw conflicts with provincial law and defeats a permit issued to the defendant by the Province under the *Mines Act*, R.S.B.C. 1996, c. 293. The third defence is that the amended bylaw is impermissibly discriminatory in respect of the operations of the defendant -- an argument that again arises from the *Community Charter* in terms of what the District is or is not allowed to do.

[11] The District relied on the presumption of validity and referred to a number of cases that confirmed the presumption’s operation in a municipal context (*Westcoast Energy Inc. v. Peace River (Regional District)* (1998), 54 B.C.L.R. (3d) 45, 167 D.L.R. (4th) 98 (C.A.); *Kent (District) v. Storgoff*, [1962] B.C.J. No. 38, 40 W.W.R. 278 (S.C.); *Denman Island Local Trust v. 4064 Investments Ltd.* (1 June 2000), Vancouver A991084 (B.C.S.C.). The judge noted at para. 15 the applicant’s position that:

> ... once an arguable defence is raised with respect to the validity of the bylaw, inevitably that means that a strong case in terms of a breach cannot be established to meet the test and the presumption does not apply.

[12] She referred to *Martin v. Chilliwack (City)*, 2003 BCSC 942, [2003] B.C.J. No. 1431, stating that Madam Justice Ballance in that case “confirmed that a strong case had to be demonstrated [by the municipality] and ... also confirmed the existence of [a] residual discretion” as to whether to grant an injunction.

[13] The applicant relied on *Saanich (District) v. Island Berry Company Ltd.*, 2008 BCSC 614, [2008] B.C.J. No. 881, which the chambers judge distinguished on the basis that “none of the authorities concerning the presumption of validity were raised before the Court” in that case (para. 18).

[14] It was the judge’s view that the applicant had an arguable defence, but she concluded at para. 20:

> Having considered these authorities, it is my view that the mere raising of an arguable defence on the part of the defendant in this case does not displace the presumption of statutory validity that appears to be clearly established by the authorities. It is further my view that the defendant must abide by the terms of the amended bylaw unless and until it is decided by this Court that the bylaw is invalid.

[15] The judge noted that the situation was not urgent and did not arise suddenly: the dispute arose in the summer of 2010 “almost three years after the amended bylaw was put in place” (para. 21). She continued at paras. 21 - 22:

> ... I fully agree, again, with the comments of the Court in *Kent* that to allow persons in our society to ignore the law simply on the basis that they have arguments that they wish to present at a later

> point in time is to invite mayhem and engender a disregard for the rule of law in our society. I do not think that that is a satisfactory situation.
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> In my view, this is also not an appropriate basis upon which to exercise any residual discretion I may have … .

Positions of the parties

[16] The applicant contends that the issues are of significance to the practice and to the action, stating at para. 35 of its submission that "the authorities concerning the relevance of the 'presumption of validity' when an interlocutory injunction is sought are not in harmony".

[17] In support of the contention that the appeal has merit, the applicant asserts that the judge erred in:

> (i) failing to consider the arguable defences raised by the Defendant in determining whether there had been a clear breach of the Plaintiff's Amended Soil Removal Bylaw (the "Amended Bylaw");
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> (ii) finding that a presumption of validity precluded the Defendant from relying on the arguable defence that the Amended Bylaw did not apply to its operations permitted by the Permit; and
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> (iii) failing to consider the evidence tendered by the Defendant to rebut the presumption of validity, particularly in the absence of any evidence led by the Plaintiff to establish a proper purpose for adopting the Amended Bylaw.

The applicant also contends that the judge did not deal with its contention that the bylaw does not apply to it because its activities are governed by the mines permit.

[18] The applicant states that an appeal would not disrupt the action which is scheduled to go to trial on February 13, 2012.

[19] The District disputes the applicant's challenges to the bylaw. It states that the amendment did not require ministerial approval because it does not prohibit, but regulates and that the bylaw properly created a moratorium to allow for the preparation of a new bylaw which would address a number of the District's concerns. The District contends that this Court's decision in *Squamish (District) v. Great Pacific Pumice Inc.*, 2003 BCCA 404, [2003] B.C.J. No. 1567 is a complete answer to the applicant's contention that the mines permit prevails over the District's bylaw.

Discussion

[20] The test for granting leave to appeal was confirmed in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326, [2000] B.C.J. No. 998, in which Saunders J.A. (in Chambers) stated at para. 10:

> The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp*. (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
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> (1) whether the point on appeal is of significance to the practice;
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> (2) whether the point raised is of significance to the action itself;
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> (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

The overarching consideration is the interests of justice (*Canadian Western Bank v. Vinterra Properties Inc.*, 2011 BCCA 170, [2011] B.C.J. No. 716 at para. 11, Chiasson J.A. in Chambers).

The merits

[21] I begin my discussion of the judge's approach with a point of clarification. The chambers judge stated at para. 13 that *Martin* confirmed that an applicant for a statutory injunction must demonstrate a "strong case". She wrote at para. 15:

> ... The [applicant] ... contends that once an arguable defence is raised with respect to the validity of the bylaw, inevitably that means that a strong case in terms of a breach cannot be established to meet the test and the presumption does not apply. [Emphasis added.]

[22] While the judge in *Martin* used the phrase "strong case" (para. 18), the cases to which she referred did not do so (the judge used the phrase "clear breach" in reaching her conclusion at para. 30). The chambers judge in the present case applied the correct test of "clear breach", as was agreed to by the parties.

[23] Consideration of the third criterion in the test for leave to appeal is likely to affect consideration of the other factors in this case.

[24] The applicant states at para. 4 of its submission:

> In effect, the chambers judge held that a presumption of validity applied to insulate the [District's] Amended Bylaw from any degree of scrutiny on an interlocutory application, despite the evidence that the Amended Bylaw was adopted for the specific, colourable purpose of prohibiting the [applicant's] operations, which evidence was not challenged by the [District].

[25] In argument, counsel for the applicant contended that the approach taken by the judge rendered the presumption of validity irrebuttable. The applicant also asserts that the judge did not take into account the evidence in support of its claimed defences. In particular, it refers to discovery evidence concerning the purpose of the enactment of the bylaw's amendment. It states that in this case, as in *Island Berry*,

> ... where there is an allegation the Amended Bylaw is a colourable prohibition, there was positive evidence to support the allegation before the chambers judge, and no evidence from the [District] to the contrary, the presumption is rebutted to prevent the draconian remedy of an interlocutory injunction.

The applicant submits that the above statement supports granting leave to appeal in this case.

[26] I would not describe the remedy in cases like the present as "draconian", although it can be quite severe. One must remember that the remedy arises in a case such as this because a party is violating the law. More precisely, the applicant considered the law to be flawed and resorted to self-help.

[27] Because upholding the rule of law is an essential function of courts, the authorities have made it clear that considerations of irreparable harm and the balance of convenience are not required on an application for a statutory, interlocutory injunction. The courts have confirmed, as the judge acknowledged in this case, that the court has a residual discretion as to whether to grant an injunction even where there is a clear breach.

[28] There is language in *Island Berry* at paras. 30 and 36 that supports the applicant's position:

> It is not possible to determine the eventual outcome of all these defences at trial; in my view, the defendant raises an "arguable case" or one that it can "reasonably argue" on the first and final issues. In the result, I am unable to conclude that the plaintiff established a clear breach of the Deposit of Fill Bylaw.
>
> ...
>
> I am not called upon to make a final determination that the Deposit of Fill Bylaw was a colourable attempt by the plaintiff to enact a s. 910 bylaw without seeking Ministerial approval. The only question is whether it is reasonably open to the defendant to make that argument. I am satisfied that it is. It follows that there is no clear breach and I dismiss the application for an interlocutory injunction.

As noted, the judge distinguished *Island Berry* because no reference was made in that case to the presumption of validity.

[29] The applicant also points to *Nanaimo v. Jameson Quarries Ltd.*, 2005 BCSC 1639, [2005] B.C.J. No. 2566, and to *North Pender Island Local Trust Committee v. Conconi*, 2007 BCSC 1436, [2007] B.C.J. No. 2100. There is language in both cases that tends to support the applicant's position, but in both cases, at issue was whether the bylaw applied to the defendants. In the present case the chambers judge noted at para. 19 that the applicant conceded that in *Jameson* and other cases, there were factual issues concerning whether the subject bylaws applied.

[30] The applicant asserts that these cases illustrate the fact that there is inconsistency among the authorities. While these cases may be distinguished on the basis either that there was no reference to the presumption of validity or on their facts, language in them tends to support the proposition that a plain breach cannot be established for the purpose of obtaining an interlocutory, statutory injunction when a respondent has an arguable defence.

[31] Having set out the parties' arguments, it is important to place the present case into context.

[32] An appropriate starting point is *Kent (District)*, a case to which the chambers judge referred, in which Mr. Justice Munroe, after quoting President Kennedy of the United States of America, had this to say at para. 9:

> The self-evident truths contained in that excerpt from President Kennedy's stirring message apply with equal force to Canadians as to Americans. The democratically elected councillors of the plaintiff municipality, who may be assumed to have acted responsibly, have enacted a bylaw. It may or may not be found at the trial of this action to have been a valid exercise of their powers as such councillors, but at the moment it is the law, and must therefore be respected and observed unless and until it is ruled invalid by the courts. To realize how it could not be otherwise, one has only to mention the chaos that would result if we were all at liberty to disobey or disregard any law which we opposed merely because of an opinion expressed by some person, however eminent,

> that such law is invalid. It is not uncommon for an attack to be made from time to time upon the validity of legislative enactments in Canada. Indeed, there is one such trial now in progress in this court wherein the validity of a provincial statute is being questioned, but it is uncommon for responsible persons to suggest that, without the concurrence of the legislative body concerned, its legislative enactments may be disobeyed. No one, including a Judge, can have such authority.

[33] In *Kamloops (City) v. Baines* (1996), 32 M.P.L.R. (2d) 264 (B.C.S.C.), the court commented at para. 10:

> Reid, J. in *Ontario (Attorney General) v. Grabarchuk* (1976), 67 D.L.R. (3d) 31 (Ont. Div. Ct.), held in effect that the balance of convenience and apprehended damage are irrelevant when a court is asked to restrain the clear breach of a statute or a bylaw even if such an injunction in effect grants the whole relief sought. In *Shaughnessy Heights Property Owners' Assn. v. Northup*, (1958), 12 D.L.R. (2d) 760 (B.C. S.C.), Macfarlane J. stated at page 763:
>
>> Mr. Guild's primary submission was that the remedy that the statute provides is a remedy by way of injunction, that the action being in equity, failure on the part of the Association over many years to enforce the Act raises an equity against the plaintiff. Mr. McFarlane says this is not an equitable proceeding; nor is the remedy by way of an injunction asked for in this action an equitable remedy; that the action is based on a statute and the remedy asked is a statutory remedy. Here again I think the reasons of the Court of Appeal make it clear that the right of action is a right based on the statute. As that judgment is unreported, I quote the relevant part of the reasons. Mr. Justice O'Halloran says: 'In my judgment the statute speaks clearly and leaves no room for doubt as to its purpose, namely, that any violation of the statute such as occurred here, or any attempted violation, may be restrained by injunction. Proof of violation or attempted violation in my judgment is the sole essential to obtain an injunction. For these reasons I would dismiss the appeal'.

[34] These comments were adopted by this Court in *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 47 M.P.L.R. (2d) 249 (B.C.C.A.), with the observation that "courts will be reluctant to refuse [a statutory injunction] on discretionary grounds" (para. 9).

[35] A year later, in *Langley (Township) v. Wood*, 1999 BCCA 260, [1999] B.C.J. No. 1001 at para. 17, this Court held that there is no discretion to refuse a statutory injunction once a breach of a bylaw is established.

[36] *Thornhill* and *Wood* involved statutory, permanent injunctions. In *Burnaby (City) v. Pocrnic*, 1999 BCCA 652, [1999] B.C.J. No. 2541, which involved an application for a statutory, interlocutory injunction, this Court, referring to *Capital (Regional District) v. Smith* (1998), 168 D.L.R. (4th) 52, [1998] B.C.J. No. 2793 (C.A.), confirmed at para. 15 that there is a residual discretion, but that it is limited:

> ... there is a discretion but, because the right to an injunction is created by statute and because the public interest must be weighed against any hardship which the order may impose on the defendants, the scope of the discretion is narrow.

In 2005, this Court in *Maurice* stated that such discretion would be exercised only in exceptional circumstances.

[37] In summary, the approach of the court on an application for a statutory, interlocutory injunction is rooted in the rule of law. While there is a residual discretion not to grant the relief, the scope of this discretion is very limited.

[38] A "plain breach" of the law is required. It is not controversial that "[b]y-laws are presumed to have been validly enacted until the contrary is established" (*MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 126 D.L.R. (4th) 449, 10 B.C.L.R. (3d) 121 (C.A.), at para. 144). That is, the presumption of validity applicable to legislation applies equally to bylaws.

[39] The applicant states at para. 6 of its submissions that "the only appellate level authority relied on by the chambers judge with respect to the presumption of validity was *Westcoast Energy Inc. v. Peace River (Regional District)* (1998), 54 B.C.L.R. (3d) 145, 167 D.L.R. (4th) 98 (C.A.)", and that she cited a dissenting opinion. The judge referred to the case at para. 10:

> The cases referred include *Westcoast Energy Inc. v. Peace River (Regional District)* (1998), 54 B.C.L.R. (3d) 45 (C.A.), and in particular para. 34 of that case.

The last sentence of para. 9 shows clearly that the judge was noting the cases referred to by the District. In any event, as is apparent from *MacMillan Bloedel*, the relevant statement in *Westcoast Energy Inc.* is not controversial:

> ... it is important to bear in mind the presumption of validity; that is, that legislation (the by-laws in this case) is presumed to be valid until proven otherwise.

[40] I turn briefly to the cases referred to by the chambers judge as supporting the application of the presumption of validity.

[41] In *Martin*, following *Monarch Holdings Ltd. v. Oak Bay (District)* (1977), 4 B.C.L.R. 67, 79 D.L.R. (3d) 59 (C.A.), the court applied the presumption. *Monarch* confirmed that the onus is on the party challenging an enactment to establish invalidity. That is, the validity of an enactment is presumed.

[42] Similarly, in *Denman Island*, Mr. Justice Pitfield stated at para. 29 that he was required to presume the bylaw under review was valid "until ... proven otherwise". He noted that the validity of the bylaw was simultaneously under consideration by another judge and that "[i]t would be completely inappropriate and unnecessary for [him] to consider whether the by-laws are invalid for any reason ... ." He declined to consider the merits of the defendant's claim that the bylaws were void.

[43] The conclusion of the chambers judge at para. 20 is consonant with the authorities to which I have referred:

> Having considered these authorities, it is my view that the mere raising of an arguable defence on the part of the defendant in this case does not displace the presumption of statutory validity that appears to be clearly established by the authorities. It is further my view that the defendant must abide by the terms of the amended bylaw unless and until it is decided by this Court that the bylaw is invalid.

[44] Much has been said about the nature of the presumption of validity: in plainest terms, it is rooted in the concept that a legislator need not prove the validity of an enactment. This was the basis for its application in *Martin*, in which the respondent asserted that the City had the onus of proving that its bylaw had ministerial approval. In fact, the City did so, but the judge went on to state that in any event the presumption of validity applied.

[45] In my view, in the case of an application for an interlocutory, statutory injunction, the presumption of validity appears to operate in tandem with the policy that the law must be obeyed until it is changed.

[46] The proposed appeal is of an interlocutory injunction. The applicant concedes that such an order is discretionary and that this Court will interfere only if the judge erred in principle or if the order is plainly wrong. The applicant contends that by establishing it has an arguable defence, the presumption of validity is rebutted and a plain breach cannot be established. In my view, the applicant's position, while arguable, is problematic.

[47] Beginning with *Kent*, the relevant case law establishes the principle that laws must be obeyed unless and until they are set aside. In a case such as the present, the applicant's activities clearly are contrary to the plain language of the enactment. The applicant raises defences, but those defences have not been determined. They were described by the judge, and indeed the applicant, as arguable. Generally, it is most unlikely that on an application for an interlocutory injunction, a chambers judge would decide whether an enactment is valid, unless the result was plain and obvious. The presumption of validity, which pertains until an enactment is set aside, supports the requirement that laws must be obeyed while they are in force.

[48] The applicant contended that the amending bylaw was not valid. In response to that position, the District relied on the presumption of validity. The applicant did not contest the existence of the presumption, but says it may be rebutted by raising arguable defences. It asserts that the judge conflated the presumption as an evidentiary standard with the application of the legal standard of clear breach. Relying on paras. 19 - 22 of *Martin*, the applicant states that evidence is required to rebut the presumption and that the judge failed to take this requirement into account.

[49] It is apparent that the rule of law requires obedience to existing laws. Although the court has built into the process of considering whether to grant a statutory, interlocutory injunction a residual discretion not to enjoin illegal conduct, it is to be used sparingly. The fact that a litigant contends that a law is not valid does not make conduct in violation of that law legal.

[50] *Martin* is a case on point, despite the fact that the application of the presumption of validity was somewhat of a subsidiary issue in that case. Ballance J. held that the City was entitled to rely on the presumption in meeting the respondent's assertion that there was no ministerial approval. In the present case there is no ministerial approval; the District submits that it is not required. That is an argument that will be addressed at trial.

[51] The judge did not ignore the evidence adduced by the applicant. As quoted above, she referred to the applicant's positions at para. 5 of her reasons. She concluded they raised an arguable defence – that is, an arguable case to rebut the presumption of validity. At the stage of considering an interlocutory injunction, in the absence of the clearest of situations, a chambers judge is unlikely to conclude that the presumption of validity has been supplanted to the extent of allowing a party to continue with a clear breach of the law.

[52] Although I consider that the judge's approach and conclusion consonant with existing authority, I recognize that there is some merit in the applicant's assertion that this Court should consider reconciling the apparent inconsistencies among some of the authorities. The applicant contends that the establishment of an arguable defence undermines the ability of an applicant for a statutory, interlocutory injunction to establish a plain breach and that, in any event, such an argument must be taken into account when applying the presumption of validity.

[53] The judge, in making her decision, appears to have declined to exercise her residual discretion not to grant the injunction. Generally, this Court would not interfere with such a conclusion, but, in this case, the judge's determination may have been influenced by or based on her consideration of the primary position of the applicant that establishing an arguable defence rebuts the presumption of validity.

[54] As noted, the District submits that this Court's decision in *Pumice* stands as a complete answer to the applicant's contention that the mines permit prevails over the District's bylaw. I observe that in *Jameson Quarries* and *Cowichan Valley (Regional District) v. Norton*, 2005 BCSC 1056, [2005] B.C.J. 1635, the court discussed and refined the scope of the application of *Pumice*.

[55] For the above reasons, I would not refuse leave to appeal based on a consideration of the third criterion.

Significance to the practice

[56] Insofar as the applicant seeks to establish new or modified factors for consideration on an application for a statutory, interlocutory injunction, the proposed appeal would have significance to the practice.

Significance and hindrance to the action

[57] I consider criteria two and four together because, in my view, in this case they are interrelated.

[58] At the hearing I expressed a concern that the proposed appeal might be or become moot. The parties both sought to assuage my concern.

[59] The applicant presently is not removing soil. Apparently, under its mines permit, it cannot do so between November and April. This means that it would not resume operations in any event until April 1, 2012, approximately one and one-half months after the commencement of the trial. The trial will

address all aspects of the positions of the parties, including the District's right to a permanent injunction and the applicant's challenge to the amended bylaw.

[60] It is possible that a decision could be given before April 1, 2012, which would sustain the position of one of the parties or, it may be hoped, at least provide some guidance to them. If judgment were not pronounced and the applicant intended to recommence excavation, the District might seek an injunction based on the pending resolution of the dispute by the trial judge.

[61] It is contended that a decision by this Court on the proposed appeal would assist the parties and the court if the District were to conclude that it again was necessary to apply for a statutory, interlocutory injunction. That argument presumes a decision by this Court before April 1, 2012, which is a possibility, but not a certainty. In addition, the circumstances then facing the parties might be completely different.

[62] These factors suggest that there is a risk that an appeal may hinder the progress of the trial either by delaying the hearing or by causing the trial judge to defer deciding the case, pending a determination of the appeal. Standing alone, this possibility might not be of great concern, but it is important to consider the context.

[63] The trial is scheduled to begin in less than three months. At issue will be the validity of the amended bylaw and its legal application to the applicant. The court will be asked to determine whether the bylaw was enacted validly and whether it applies to the applicant notwithstanding its mines permit. These are the core issues underlying the dispute. While there may be some residual value in determining conclusively whether the interlocutory injunction should have been granted in that the applicant was prevented from operating for two months, it nonetheless would not have operated for the majority of the time period in question, that is, from November 2011 to April 2012.

[64] Also of potential significance is the outstanding new bylaw which authorizes extraction and deposit of up to 100,000 m^3 of soil per year, the same amount authorized by the mines permit. If this bylaw were enacted, it might defuse the dispute between the parties.

[65] In my view, I do not consider the proposed appeal is significant to the action in that it will not address the core issues between the parties. An appeal risks hindering the progress of the action, although it is difficult to state to what extent.

Conclusion

[66] Taking into account the merits of the appeal, its significance to the practice, the close proximity of the trial, the issues that will be dealt with at that trial and on the proposed appeal and the spectre of mootness, I do not consider it to be in the interests of justice to grant leave to appeal in this case.

[67] The application for leave to appeal is dismissed.

"The Honourable Mr. Justice Chiasson"

TAB 7

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *College of Opticians of British Columbia v. Coastal Contacts Inc.*, 2009 BCCA 459

Date: 20091026
Docket: CA036116

Between:

College of Opticians of British Columbia

Appellant
(Petitioner)

and

Coastal Contacts Inc. and Clearly Contacts Ltd.

Respondents
(Respondents)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, April 25, 2008 (*College of Opticians of British Columbia v. Coastal Contacts Inc.,* 2008 BCSC 617)

Counsel for the Appellant	D. Lunny M. Baird
Counsel for the Respondents	M. Clemens, Q.C. J. Lawn
Place and Date of Hearing:	Vancouver, British Columbia May 13, 2009
Place and Date of Judgment:	Vancouver, British Columbia October 26, 2009

Written Reasons by:
The Honourable Madam Justice Neilson

Concurred in by:
The Honourable Chief Justice Finch

Dissenting Reasons by:
The Honourable Mr. Justice Lowry (p. 15, para. 36.)

Reasons for Judgment of the Honourable Madam Justice Neilson:

INTRODUCTION

[1] This is an appeal from an order of a Supreme Court judge dismissing the appellant's application pursuant to s. 52 of the *Health Professions Act*, R.S.B.C. 1996, c. 183, (the "*Act*") to enjoin the respondents from selling, dispensing, or otherwise furnishing prescription contact lenses to the public in British Columbia, in contravention of ss. 5(3) and 5(4)(c) of the *Opticians Regulation*, B.C. Reg. 487/94 (the "*Regulation*").

LEGISLATIVE AND FACTUAL BACKGROUND

[2] The appellant is the regulatory body for opticians, who are eye care professionals that specialize in the preparation, fitting, and dispensing of ophthalmic appliances, including contact lenses. It is created and governed by the *Act*, which permits the Minister of Health Services to regulate designated health professions, including opticians, by establishing health profession colleges whose duty is to protect and serve the public by superintending the practice of those professions.

[3] The *Regulation* was enacted pursuant to s. 12(2) of the *Act*, which permits the Minister to enact regulations prescribing services that may only be provided by registrants of a college. It was revised in 2008 (B.C. Reg. 287/2008), but the provisions relevant to this appeal remained substantially unchanged. These reasons accordingly refer to the *Regulation*, which was in force when the appellant's petition was filed. These are the provisions relevant to this appeal:

> 1. In this regulation:
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> ...
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> "contact lens fitter" means an optician who is authorized under the bylaws to fill a prescription and to fit and dispense contact lenses;
>
> ...
>
> "prescriber" means
>
> (a) an optometrist, or
>
> (b) a qualified medical practitioner
>
> who prepares a prescription;
>
> "prescription" means the written record, prepared by a prescriber, of
>
> (a) the power of a lens to correct the refractive error of an eye, and
>
> (b) reading add, prisms, back vertex distance and contraindications;
>
> …
>
> "supervision" means, if supervision is not governed in accordance with the *Optometrists Act* or the *Medical Practitioners Act*,
>
> …
>
> (b) in relation to the services described in section 5 (3), that
>
> (i) a prescriber or contact lens fitter is normally on the premises, although he or she may be absent from time to time, not including holidays,
>
> (ii) a prescriber supervises the fitting or dispensing of contact lenses by a person other than a prescriber or contact lens fitter, and
>
> (iii) a contact lens fitter supervises the refilling of a prescription if contact lenses are dispensed by a person other than a contact lens fitter.
>
> ...

Reserved acts

5(1) Subject to section 14 of the Act, no person other than an optician may

(a) fill a prescription by dispensing eyeglasses, or

(b) duplicate eyeglass lenses without a prescription.

(2) Subsection (1) does not apply to a person acting under the supervision of an optician or a prescriber provided that the measurements necessary for the manufacture of the eyeglasses or eyeglass lenses and the power described in the prescription are verified by the optician or prescriber at or before the time of final dispensing of the eyeglasses or eyeglass lenses.

(3) Subject to section 14 of the Act, no person other than a contact lens fitter may fill a prescription by fitting and dispensing contact lenses.

(4) Subsection (3) does not apply to a person

(a) filling a prescription by fitting and dispensing contact lenses under supervision,

(b) filling a prescription by fitting and dispensing contact lenses under supervision provided that

(i) the person is registered in accordance with the bylaws as a student contact lens fitter, and

(ii) the contact lens fitter is immediately present at all times, or

(c) refilling a prescription by dispensing contact lenses under the supervision of a contact lens fitter or a prescriber provided that person does not fit the contact lenses.

[4] The respondents are affiliated companies that sell prescription contact lenses to the public, primarily through the Internet. A prospective purchaser entering the respondents' web site must first agree to a series of terms and conditions, which includes this:

VALID PRESCRIPTION REQUIRED

You hereby certify that you have a valid prescription for the contact lenses that you are ordering. You represent and warrant to us by placing an order on the Site that your information you enter into the Site is valid and true and matches exactly your prescription as provided by your eyecare provider. You further certify that you will review your prescription in strict accordance with your eyecare provider's suggested regime. You understand that we will not fulfill your order if, to our actual knowledge, you do not have a valid prescription. You hereby consent to our contacting your eyecare provider, if necessary, to verify your prescription information and any other necessary information.

[5] The terms and conditions also include these provisions with respect to limitations on the respondents' liability:

DISCLAIMERS AND LIMITATION OF LIABILITY

The Site is provided "as is" and we exclude all warranties of any kind to the fullest extent permissible by law and do not guarantee the accuracy or completeness of the Site or any information or content or that it is free of defects or viruses.

You agree that the Site, including the content, is provided free of charge. Neither we will (*sic*) be liable to you nor any person for any loss or damage of any kind which may arise from the unauthorized use of the Site and the use of any information contained within it. Furthermore we shall not be held liable for any information held on sites which may have links to or from the Site and which are not maintained and controlled by us. We will use reasonable endeavors to ensure that the Site is and stays fully operational. Due to the nature of the Internet, we cannot guarantee that the Site will be free from delays, interruptions or errors. We take all reasonable efforts to ensure that information on the Site is correct, but we cannot give representations or warranties, express or implied, in relation to the accuracy or completeness of the said information.

> We take precautions to protect personal data collected through the Site but in the event that our system is infiltrated by unauthorized third parties we will not be liable for any resulting misuse of the personal data.
>
> Any of our liability resulting from use of or visiting the Site, the delivery of defective products and/or services, will be limited to direct damages and up to the amount of the price stipulated for the items concerned. Liability for indirect damages is in all circumstances excluded.
>
> Without prejudice to the provisions set out above, we will not be liable in the event that the damage was caused by any intentional act or omission or gross negligence by you or your improper use of the contact lenses and or related products sent to you.
>
> The content contained in this Site is provided by us as a service to our customers. This Site does not contain information about all eye diseases, nor does this Site contain all medical information that may be relevant to your eye care needs. The information provided in this Site is only general health information, and is intended only to facilitate communication between you and your professional eye care provider. This Site does not provide medical diagnosis for any individual and must not be used as a substitute for professional medical advice, diagnosis, treatment or care. All specific medical questions you may have about your specific medical condition, treatment, care, or diagnosis must be presented to your professional eye care provider. You should never disregard medical advice or delay seeking professional advice because of any information contained in or related to this site. Except as expressly and unambiguously stated otherwise, we do not endorse, operate, control, or assume responsibility for any product, brand, method, treatment, information or service on this Site. The information, services, and products contained in this Site are provided "as is" without warranty of any kind, express or implied.

[6] Once the customer accepts those terms, he or she is directed to type onto an online form the four measurements for each eye that correspond to the measurements that must be taken by a licensed eye care professional when providing a prescription for contact lenses. The customer then chooses the desired brand of lenses and fills out an online method of payment. The process does not require the customer to produce a prescription. Nor does it verify the customer's prescription.

[7] The respondents keep an inventory of contact lenses from manufacturers. When an order is received, their warehouse employees, who are not opticians, match the customer's online specifications to the inventory, and pack and ship the stipulated lenses to the purchaser. Since January 2006, the respondents have employed a licensed optician and contact lens fitter who supervises this process by checking the contact lenses against the information provided by the customer before they are shipped. The appellant has asked for this person's name and the respondents have declined to provide it.

[8] Three of the appellant's employees provided affidavits describing how they ordered and received contact lenses from the respondents. Ms. van Altena, an employee of the respondents' counsel, also provided affidavits about two orders for contact lenses that she submitted to the respondents.

THE REASONS OF THE CHAMBERS JUDGE

[9] The chambers judge properly defined the issue before her as the correct interpretation of ss. 5(3) and 5(4)(c) of the *Regulation*. She observed that both parties asserted that these provisions were plain and unambiguous, and that she must be guided by the modern approach to statutory

interpretation adopted in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26:

> In Elmer Driedger's definitive formulation, found at p.87 of his *Construction of Statutes*, (2nd ed. 1983):
>
> > 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.

[10] The chambers judge identified the object of the *Regulation* at paras. 35 - 36 of her reasons:

> [35] ... There is no question that the object of the *Regulation* is to protect the public. This is sought to be accomplished in more than one way. One way is to ensure that only qualified persons with special training undertake certain activities, thus protecting the health and safety of the public. Another way is to ensure that in providing for qualified persons to undertake certain activities, the scope of these activities is not extended too far. This protects the public from a monopoly that is too wide, driving up costs for the consumer for matters that do not require the same degree of intervention by trained specialists.
>
> [36] The *Regulation* seeks to carve out and define the scope of activities that require the direct involvement of a licensed optician on the one hand, or the supervisory involvement of a licensed optician on the other hand.

[11] With respect to the alleged infringement of s. 5(3), the chambers judge identified the key issue as whether the respondents' conduct amounted to filling a prescription by fitting and dispensing contact lenses. By reference to the expert evidence of Mr. Harvey Berkowitz, an optician licensed in the United States, and the *Professional Standards of Practice* promulgated by the appellant, she determined that the fitting of contact lenses involved an eye examination and some measurements of the eye. She found that the respondents had not contravened s. 5(3) as there was no evidence that they fitted the contact lenses they sold:

> [39] The plain meaning of the *Regulation*, considered in the context of the object of the *Regulation*, is that when fitting of contact lenses is involved, which involves an eye examination and measurements of the eye, contact lenses cannot be dispensed except by a contact lens fitter pursuant to s. 5(3). This ensures that a qualified person is involved in the fitting of contact lenses. When fitting is not involved, a non-registered person may dispense contact lenses provided that the person is supervised by a contact lens fitter, pursuant to s. 5(4).
>
> [40] It makes sense and is in accord with the public interest that a contact lens fitter does not need to be as directly involved in the dispensing of contact lenses once the fitting has already taken place. It is undisputed that the respondents did not engage in "fitting" the contact lenses they sold. This means they were not "filling a prescription by fitting and dispensing contact lenses," and so on the ordinary meaning of s. 5(3), they were not in contravention of the *Regulation*.

[12] With respect to the alleged infringement of s. 5(4)(c), the chambers judge found the evidence established that the respondents' employees were dispensing contact lenses under the supervision of a licensed optician and registered contact lens fitter. She rejected the appellant's argument that s. 5(4)(c) mandated that each refill of a prior prescription for contact lenses required a new examination and fitting:

> [44] In my view, the *Regulation* is not capable of the meaning asserted by the petitioner. Subsection 5(4)(c) clearly contemplates a prescription being refilled and dispensed without the

> purchaser of the contact lenses being fitted again. However, it repeats the prohibition on any fitting by a non-registered person and it requires supervision by a registered person. Consistent with the *Regulation*, there is nothing in the *Standards* that indicate that an eye examination is needed when refilling a prescription for contact lenses.
>
> [45] The petitioner did not allege in its petition that the respondents breached s. 5(4)(c) of the *Regulation*, or that the level of supervision by the contact lens fitter was inadequate. In any event, for clarity, I conclude that the College has not made out a case that s. 5(4)(c) was contravened by the respondents.

[13] The chambers judge dealt with the appellant's argument that the respondents were in breach of the *Regulation* because they did not require prescription verification under the heading "Policy Issues". She rejected the appellant's position that an analogy could be drawn to the federal *Fairness to Contact Lens Consumers Act*, H.R. 3140, which expressly provides that American sellers of contact lenses must verify the actual prescription. She found there was no principled basis on which she could read a prescription verification requirement into the legislative scheme of this province. Nor was she convinced that the objective of public protection justified such an interpretation. She stated:

> [56] The petitioner likened the sale of contact lenses over the internet, without actual documentary proof of a prescription, as akin to the sale of morphine over the internet without proof of a prescription. I do not find the comparison apt. The only risk identified on the evidence is that of a consumer making a mistake in a purchase order by incorrectly transcribing prescription information. That could lead to the consumer receiving a product that does not meet the consumer's needs, which presumably the consumer would notice as soon as he or she tried to use the contact lenses. I am not prepared to speculate on whether greater harms are likely.
>
> [57] If the petitioner believes that a prescription verification requirement is necessary in the public interest, then it is free to work towards legislative change. Opponents might argue that such a change would create an unnecessary burden for consumers of contact lenses, drive up costs and assist members of the College in extending a monopoly over the sale of contact lenses. This debate would be up to the legislators to resolve.

ANALYSIS

[14] The scope of the appellant's argument has evolved in the course of this proceeding. Its petition alleged a breach of s. 5(3) on the basis that the respondents did not require a prescription before dispensing contact lenses, and that they did not have an optician who was a contact lens fitter on staff to fit and dispense contact lenses. By the time the petition was heard, the appellant had learned that the respondents did employ an optician/contact lens fitter. It therefore expanded its argument to allege a breach of s. 5(4)(c) as well. Although the petition was not formally amended to reflect this, the chambers judge dealt with both arguments. The appellant did not challenge her finding that the respondents did not fit the lenses they sold, and so the focus of this appeal became whether they had contravened s. 5(4)(c). However, since s. 5(4)(c) is enacted as an exception to s. 5(3), the interpretation of s. 5(3) remains relevant.

[15] The appellant agrees that the chambers judge properly adopted the modern approach to statutory interpretation. As well, it accepts her finding that the legislative objective of the *Regulation* is to protect the public. It argues, however, that her interpretation of the *Regulation* is erroneous and inconsistent with that objective. The appellant maintains that the clear wording of the *Regulation* requires a person dispensing contact lenses to verify the customer's prescription, independent of the

customer's representation, before providing the lenses. It says that the respondents' process, by which a customer provides self-reported and limited details of an unseen prescription to a dispenser that disclaims all liability for its product, amounts to no more than a system of *caveat emptor*. It argues that this is a clear breach of ss. 5(3) and 5(4)(c) of the *Regulation*, and does not accord with the objective of protecting the public.

[16] The proper construction of the *Regulation* is a question of law, and is reviewable on a standard of correctness. Whether the respondents' actions fell within the *Regulation* is a question of fact, and will only attract review if the judge made a palpable and overriding error: *Canadian Lift Truck Co. v. Deputy Minister of National Revenue* (1955), 1 D.L.R. (2d) 497 (S.C.C.); *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 10.

[17] The chambers judge found that the principles of statutory interpretation did not permit her to read a prescription verification requirement into the *Regulation*, and accordingly found that the respondents were not in breach of the legislation. Her reasons suggest that she reached that result by comparing the *Regulation* to the American *Fairness to Contact Lens Consumers Act*, which sets out an express process for confirmation of the prescription. She does not appear, however, to have examined the definition and role of a "prescription" in the *Regulation* in reaching her conclusion. In my view, she erred in failing to do so, and in denying the injunction sought by the appellant.

[18] "Prescription" is clearly defined in the *Regulation*. It is a written record of the technical requirements for optical lenses, prepared by a prescriber. A prescriber is defined as an optometrist or qualified medical practitioner, health care professionals whose qualifications differ from those of opticians. Section 5(3) states who may fill a prescription. Section 5(4)(c) provides an exception to s. 5(3) with respect to who may refill a prescription.

[19] Thus, on the plain wording of those provisions, a person dispensing contact lenses under those subsections is filling or refilling a written record of technical specifications prepared by an optometrist or medical practitioner.

[20] The respondents do not do that. They have no written record prepared by a prescriber. Thus they have nothing to fill or refill, and accordingly cannot fill a prescription under s. 5(3) or refill it under s. 5(4)(c).

[21] The respondents argue that the customer's certification that he or she has a prescription, and acceptance of the terms and conditions on their website, constitute sufficient compliance with the requirement for a prescription under the *Regulation*. I disagree. In my view, the fact that a prescription must be a written record implies that it must be seen by the dispenser.

[22] I find support for the view that a prescription is required under s. 5(4)(c) in the wording of ss. 4(2) and 5(1)(b) of the *Regulation*, which state explicitly that an optician may duplicate eyeglass lenses without a prescription. The maxim *expressio unius est exclusio alterius* supports an inference that the failure to provide a similar exemption with respect to the professional services covered by ss.

5(3) and (4)(c) demonstrates a legislative intent to require a prescription before those services may be performed.

[23] Unlike the chambers judge, I find a useful analogy between the ways in which contact lenses and drugs are provided to the public. In both cases, a health care professional with different qualifications and expertise than the dispenser must prepare the prescription. The dispenser relies on that professional to prescribe the correct product, and has no ability to change the prescription. The clear inference is that the public is protected by having a properly qualified person discern the need for the product and provide written instructions about it to the dispenser. The harm that might arise from providing the product without that prescription may vary in degree, but that does not negate the objective of public protection underlying the requirement of a prescription for both optical lenses and drugs. The clear intent in both cases is that these should not be "over the counter" products.

[24] Even if one were to accept that certification of an unverified prescription and transmission of technical measurements for contact lenses from an unskilled customer could fulfill the requirement of a "prescription", the respondents' scheme still contravenes s. 5(4)(c) of the *Regulation*. Nothing on the respondents' website tells the customer that the "valid prescription" they are certifying must be a written record of specifications prepared by a prescriber. To the contrary, the website advises customers that if they do not have a copy of their written prescription, they may obtain the required information for transmission from their current contact lens box. The information on a manufacturer's box is clearly not a "prescription". Given these circumstances, the respondents cannot rely on the customer's certification of a valid prescription to fulfill the requirement of a prescription under the *Regulation*.

[25] The evidence shows that most of the witnesses who ordered and received contact lenses from the respondents used information from their contact lens boxes instead of from a prescription. Ms. van Altena's two orders are instructive. In each case, she says she placed her order based on a prescription from her optometrist. Yet those prescriptions each state:

> This is not a contact lens prescription. Any changes in prescription will be the sole responsibility for the ophthalmic dispenser and not that of the optometrist.

[26] Ms. van Altena says that for her first order she used information from both the prescription and her current contact lens box, but the measurements from these two sources are different, and her order form records only the information from the box. This is not explained in her evidence, but it appears clear that the information she sent to the respondents is not the same as the information from a "prescription", as defined in the *Regulation*.

[27] Moreover, the online order form completed by customers does not differentiate between an initial order for lenses under a new prescription, and a refill of an old prescription. Without that information, it is impossible for the respondents to ensure that their activities are confined to refilling prescriptions under s. 5(4)(c). Ms. van Altena's second order demonstrates this. Placed two months after her first order, she says that she used a new prescription obtained two weeks previously from her

optometrist. Again, the information she recorded on the respondents' form differed from that on the new prescription. She does not mention using information from an earlier contact lens box for this order. These features suggest that this was not a refill, but a new prescription. Nothing in the information that the respondents require from Ms. van Altena would alert them to that possibility.

[28] It is common ground that where an injunction is authorized by statute, the petitioner must simply demonstrate a clear breach of the law: *The College of Psychologists of British Columbia v. Utendale*, 2007 BCSC 824 at para. 60, [2007] B.C.J. No. 1257. I am satisfied that the appellant has met that onus, and has established that the respondents have breached s. 5(4)(c) by refilling prescriptions without having the required written record of specifications from the prescriber.

[29] The chambers judge, having found no breach of the *Regulation*, addressed the question of harm arising from the respondents' practices as a policy issue, and concluded there was little risk of harm to the public. Since I have found the respondents in breach of the *Regulation*, I approach the question of harm from a different perspective.

[30] Once a breach of a regulatory statute has been established, actual damage need not be shown. Harm to the public is presumed from the breach of the law, and the public interest in having the law obeyed ordinarily outweighs hardship to the respondent: Robert J. Sharpe, *Injunctions and Specific Performance*, 2d ed. Looseleaf (Toronto: Canada Law Book, 1992) at 3.150 - 3.160, 3.265. In *College of Opticians of Ontario v. John Doe 1 (c.o.b. Great Glasses)*, [2006] O.J. No. 5113, 154 A.C.W.S. (3d) 335 (Sup. Ct.), Spies J. expressed the principle in this manner:

> [51] The assessment of irreparable harm has a special status in injunction proceedings brought by the Attorney General or other statutory authorities to enforce obligations imposed by statute. In such cases, the need to demonstrate harm is attenuated by the fact that contraventions of the law are inherently contrary to the public interest and are presumed to cause harm or create a risk of harm:
>
> > The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds. *Saskatchewan (Minister of the Environment) v. Redberry Development Corp.*, [1987] 4 W.W.R. 654 (Sask. Q.B.) at para. 18, aff'd [1992] 2 W.W.R. 544 (Sask. C.A.)

[31] Thus, having found the respondents in breach of the *Regulation* is sufficient to justify an order enjoining them from dispensing contact lenses under s. 5(4)(c). Nevertheless, the Court retains discretion to refuse an injunction in exceptional circumstances. In my view, several unique factors in this case militate in favour of exercising that discretion by granting the injunction sought, but suspending its operation for approximately six months, until May 1, 2010.

[32] First, the appellant has provided no evidence of actual harm to the respondents' customers arising from the respondents' practices to date. Nor have they treated this as a matter of urgency; the petition was filed over two years ago.

[33] Second, as the chambers judge noted, the object of the *Regulation* is to protect the public in two ways. First, it ensures that contact lenses are only dispensed through qualified professionals. Second, it seeks to preclude a wide monopoly that would unnecessarily drive up costs for consumers on sales that do not require significant professional intervention. In my view, Internet sales of optical lenses are consistent with that second objective. Section 6(5) of the *Regulation* entitles customers to receive copies of their prescriptions. In this age of electronic communication, the respondents may be able to devise a business model that satisfies the *Regulation*. I am persuaded they should be given an opportunity to do so, rather than be required to cease operations peremptorily.

[34] Finally, the appellant at para. 47 of its factum suggests that it is open to the respondents to seek legislative change to accommodate their business model. In my view, their business should not be shut down until they have had six months to pursue that possibility.

[35] I would accordingly allow the appeal and order that the respondents are enjoined from refilling a prescription by dispensing contact lenses pursuant to s. 5(4)(c) of the *Regulation* unless and until they are in receipt of a "prescription" as defined in s. 1 of that legislation. I would, however, suspend the operation of that injunction until May 1, 2010.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Chief Justice Finch"

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[36] I have had the opportunity of reading the reasons for judgment of Madam Justice Neilson and find I take a different view.

[37] The College of Opticians of British Columbia seeks to have Coastal Contacts Inc. and Clearly Contacts Ltd. (the "suppliers") precluded from marketing contact lenses under any circumstances on the Internet. The College applied for an injunction that, if granted in the terms sought, would have that effect. The College has argued its case broadly both before the judge who dismissed its application and in this Court, but the case is, in the final analysis, narrowed to the point my colleague addresses: whether, under the governing regulations, a prescription for contact lenses may be refilled by the suppliers without their seeing the prescription.

[38] The point turns on what is permitted under s. 5 of the *Opticians Regulation,* B.C. Reg. 487/94, promulgated by the Lieutenant Governor in Council under s. 12(2) of the *Health Professions Act,* R.S.B.C. 1996, c. 183. The *Act* provides for the designation of a "health profession", here opticianry, and the establishment of the College. Section 12(2) provides for regulations for services that may be performed by members of the College (referred to as "registrants"), limits or conditions on such

services, and services that may be performed under the supervision of a member of the College by a person who is not a member. The material sections of the *Regulation* provide:

> 5 (1) ...
>
> (3) Subject to section 14 of the Act, no person other than a contact lens fitter may fill a prescription by fitting and dispensing contact lenses.
>
> (4) Subsection (3) does not apply to a person
>
> * * *
>
> (c) refilling a prescription by dispensing contact lenses under the supervision of a contact lens fitter or a prescriber provided that person does not fit the contact lenses.
>
> [en. B.C. Reg. 8/2002, s. 5]

"Prescription" is defined in s. 1:

> "**prescription**" means the written record, prepared by a prescriber, of
>
> (a) the power of a lens to correct the refractive error of an eye, and
>
> (b) reading add, prisms, back vertex distance and contraindications;

"Prescriber" is defined as well:

> "**prescriber**" means
>
> (a) an optometrist, or
>
> (b) a qualified medical practitioner
>
> who prepares a prescription.

[39] The question then is whether, under the exception s. 5(4)(c) provides, the suppliers, who dispense contact lenses under supervision, must see a prescription (the written record) before refilling it. In my respectful view, it does not. In order to refill a prescription the suppliers must, of course, be given the contents of the prescription to be refilled, but unlike my colleague, I am unable to read into the wording employed any requirement that the suppliers see the record that constitutes the prescription.

[40] At least in this context, I have difficulty seeing why the fact that a prescription is a written record implies that it must be seen by a dispenser before it is refilled, as my colleague suggests (para. 21). On the wording of the *Regulation*, I see no reason why the contents of a prescription for contact lenses, which consist of a number, or several numbers, cannot be given to the suppliers when refills are purchased.

[41] I agree with the chambers judge (para. 49) there is no principle of statutory interpretation that permits reading into the *Regulation* a provision requiring the suppliers to verify the contents of a prescription. There is no basis on which I consider the wording can be said to impose on the suppliers a requirement to inspect a prescription to determine the contents are as represented, anymore than there is a requirement they confirm the accuracy of the contents of any prescription given to them.

[42] My colleague finds support for the meaning she ascribes to s. 5(1)(4)(c) of the *Regulation* in the wording of s. 4(2), which provides that opticians may "duplicate" eyeglass lenses without a prescription, and s. 5(1)(b), which prohibits any person other than an optician from doing so (para. 22). But no argument is addressed to those sections of the *Regulation* and no evidence is adduced about the mechanics of duplicating eyeglass lenses. I have no confidence in attributing any significance to s. 4(2) or 5(1)(b) for present purposes. It may be an optician, trained in the use of the proper equipment, can have a duplicate pair of eyeglasses made based on information that can be derived from the lenses of an existing pair of eyeglasses. No prescription for the duplicate lenses would then be required. Unless it were to be established the same could be said about contact lenses, i.e., they could be duplicated from an existing lens itself (rather than from the contents of a prescription), no support could be taken from a provision concerning the duplication of eyeglass lenses in giving a particular meaning to a provision about refilling contact lens prescriptions.

[43] The chambers judge found no ambiguity in the statutory provisions but considered that because they were penal in nature they would in any event have to be interpreted strictly. She said:

> [53] Counsel for the respondents argued that the conclusions sought by the petitioner in this proceeding are penal in nature. Subsection 13(2) of the *Act* provides that if a regulation under the *Act* prescribes a service that may only be performed by a registrant of a particular college, other persons must not perform that service or recover any fee for that service. Section 51 of the *Act* provides that a person who contravenes s. 13(2) commits an offence. Thus, the petitioner is seeking a finding that amounts to a conclusion that the respondents are committing an offence.
>
> [54] Counsel for the respondents also argued that the effect of the petitioner's position would be to extend the scope of their monopoly over the sale of contact lenses in B.C.
>
> [55] If there was any ambiguity in the meaning of the statutory provisions at issue, the proper approach would be to read this section strictly rather than expansively, given that the provisions are penal in nature and seek to protect a professional monopoly: *Bell ExpressVu*, *supra* at para. 28; *Marcotte v. Deputy Attorney General (Canada)*, [1976] 1 S.C.R. 108; *George L. Brough Marine Consultants Ltd. v. Aqua Terra Flotations Ltd.* (1982), 18 B.L.R. 217 at para. 14 (B.C.S.C.).

[44] I share the chambers judge's view in this regard. A requirement that a prescription, i.e., the actual written record, be seen before it is refilled would appear to render anything less in dispensing contact lenses an offence under the *Health Professions Act.*

[45] The College maintains the provisions of the *Regulation* are to be interpreted in accordance with their object which is the protection of the public. Relying on evidence of the online purchasing process, the College contends the public is exposed to harm being suffered by the dispensing of contact lens refills which do not correspond to the prescription for any given consumer. There is said to be a great risk consumers will err when placing orders for contact lenses in providing the contents of their prescriptions. While the College has adduced no evidence of any actual harm that any consumers have suffered as a result of a purchasing error, and the judge refused to speculate as to whether such was probable, the College says the *Regulation* is to be interpreted in a way that will overcome or at least minimize any risk of this kind. But there is no principle that requires an interpretation that will minimize a risk of presumed harm simply because the object of a regulation is the protection of the public.

[46] The judge accepted the object of the *Regulation* was the protection of the public but took the view that was to be achieved in different ways:

> [35] ... There is no question that the object of the *Regulation* is to protect the public. This is sought to be accomplished in more than one way. One way is to ensure that only qualified persons with special training undertake certain activities, thus protecting the health and safety of the public. Another way is to ensure that in providing for qualified persons to undertake certain activities, the scope of these activities is not extended too far. This protects the public from a monopoly that is too wide, driving up costs for the consumer for matters that do not require the same degree of intervention by trained specialists.
>
> [36] The *Regulation* seeks to carve out and define the scope of activities that require the direct involvement of a licensed optician on the one hand, or the supervisory involvement of a licensed optician on the other hand. An example of this is s. 5(4) of the *Regulation*....

[47] The judge went on to explain the working of ss. 5(3) and 5(4)(c) of the *Regulation*:

> [38] The respondents point out that the *Regulation* distinguishes between "filling a prescription by fitting and dispensing," which must be done by a licensed optician who is a contact lens fitter, and "refilling a prescription by dispensing," which can be done by a non-registered person under supervision of a contact lens fitter.
>
> [39] The plain meaning of the *Regulation*, considered in the context of the object of the *Regulation*, is that when fitting of contact lenses is involved, which involves an eye examination and measurements of the eye, contact lenses cannot be dispensed except by a contact lens fitter pursuant to s. 5(3). This ensures that a qualified person is involved in the fitting of contact lenses. When fitting is not involved, a non-registered person may dispense contact lenses provided that the person is supervised by a contact lens fitter, pursuant to s. 5(4).

[48] Viewed in this light, on the plain meaning of the words, the *Regulation* can be seen to serve the protection of the public in both of the ways identified by the judge, thereby serving the regulatory objective. I consider that, as worded, s. 5(4)(c) leaves little room for the contention that the words "refilling a prescription" mean refilling a prescription only where the prescription (the written record) has been seen by the dispenser. Had the regulator intended it was necessary for the dispenser to see the actual record, or even a copy of it, for a prescription to be properly refilled, one would have expected some explicit provision to be made for such a significant requirement. That could certainly have been done and, for that matter, can, by amendment, still be done. I agree with the chambers judge:

> [57] If the petitioner believes that a prescription verification requirement is necessary in the public interest, then it is free to work towards legislative change. Opponents might argue that such a change would create an unnecessary burden for consumers of contact lenses, drive up costs and assist members of the College in extending a monopoly over the sale of contact lenses. This debate would be up to the legislators to resolve.

[49] I conclude, however, there is now no such requirement.

[50] The suppliers' internet site requires in no uncertain terms that a purchaser certify the existence of a prescription before any purchase can be made. My colleague has reproduced the suppliers' requirements in this regard (para. 4). In simple terms, the onus to be accurate is on the purchaser, who has a particularly great interest in providing the correct information in order to ensure, in exchange for the money paid, the receipt of contact lenses that are entirely consistent with his or her

prescription. It appears to me to make no difference whether a purchaser chooses to take the information from the actual written record that is the prescription or from what is printed on a box of contact lenses acquired in filling the prescription. There may well be real benefits to consumers in terms of time, money, and convenience associated with refilling contact lens prescriptions online with the same manufactured products sold by opticians with whom the suppliers compete. On my reading of the *Regulation*, I see nothing in the suppliers' dispensing of contact lenses to refill prescriptions that warrants enjoining them from carrying on their business as they do. Nor do I see any justification for depriving the public of the advantages there may be of the established Internet service the suppliers provide.

[51] It follows that I would dismiss the appeal.

"The Honourable Mr. Justice Lowry"

TAB 8

DATE: 20051214
DOCKET: C42347

COURT OF APPEAL FOR ONTARIO

2005 CanLII 46384 (ON CA)

GILLESE, BLAIR and JURIANSZ

B E T W E E N :	
NEWCASTLE RECYCLING LTD., WILLIAM HALE and JAMES HALE	**Cameron Murkar for NewCastle Recycling Ltd.**
Applicants/ Respondents in the Counter-Application (Respondents in Appeal)	
- and -	
THE MUNICIPALITY OF CLARINGTON	**Ian Godfrey & Melissa Panjer for The Corporation of the Municipality of Clarington**
Respondent/ Applicant in the Counter-Application (Appellant)	
- and -	
WALTER JOHN HALE, WALTER JOHN HALE in his capacity as trustee, JAMES HALE in his capacity as trustee and JCLJB HOLDINGS LTD.	
Respondents in the Counter-Application (Respondents in Appeal)	
	Heard: October 25, 2005

On appeal from the judgment of Justice R. Boyko of the Superior Court of Justice dated August 9, 2004.

JURIANSZ J.A.:

I. INTRODUCTION

[1] The Corporation of the Municipality of Clarington ("Clarington") appeals from the judgment of Boyko J. of the Superior Court of Justice dated August 9, 2004, allowing in part an application brought by Newcastle Recycling Ltd. ("Newcastle)", William Hale and James Hale for a declaration that they have the right to continue operating an auto wrecking, scrapyard, landfill and garbage collection business on property located in Clarington. The application judge granted the declaration in respect of A3, but dismissed the application with respect to the remainder of the lands that comprise Lot 12.

[2] Clarington also appeals the dismissal of its counter-application in which it sought a declaration that the respondents' business, with the exception of the auto wrecking and tire storage business carried on parcels B1 and B2, was not a legal nonconforming use and an injunction preventing the respondents from continuing to operate such business.

[3] The respondents cross-appeal from the application judge's finding that they do not have the right to carry on their business on the portions of Lot 12 other than parcel A-3.

[4] In my view, the application judge erred in failing to order a trial to determine the issues relating to the A3, B1, and B2 parcels of Lot 12. Therefore, I would allow Clarington's appeal in relation to these parcels. I would dismiss the respondents' cross-appeal in so far as it relates to parcels E1, E2, and E3.

The parties

[5] The appellant, Clarington, was previously known as the Town of Newcastle. The Town of Newcastle was the product of amalgamation of the Township of Clarke and other municipalities.

[6] The individual respondents are members of the Hale family that has owned Lot 12, Concession 3 in Clarington or parts of it at various times since 1927. The corporate respondents are companies controlled by the members of the Hale family.

[7] The Township of Clarke enacted its first zoning bylaw on May 23, 1968, designating Lot 12 as an agricultural zone. Clarington passed a zoning bylaw in September 1984, which replaced the earlier bylaw but continued the agricultural zoning for Lot 12 with one relevant exception – parcels B1 and B2 were zoned to allow their use as an auto wrecking yard.

Parcel A3

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[8] I will review only those facts necessary to explain my conclusion that the application judge erred by failing to direct a trial of an issue regarding whether there was a discontinuation of the claimed use of parcel A3.

[9] It is sufficient to say that persons other than the Hales or those related to them owned the parcels A1, A2, and A3 (the "A parcels") for approximately fourteen years commencing in 1972. From 1981 until 1986, Dianne Warren and her husband Wayne owned the A Parcels. Ms. Warren provided an affidavit that during the time that she and her husband owned the A parcels, they were not used as an auto wrecking yard, scrapyard, landfill site or garbage dump; that the Hales did not operate a business on the A parcels; and that neither she nor her husband had an agreement permitting the Hales to do so.

[10] The application judge disbelieved Ms. Warren and preferred the testimony of Billy Hale that he had an agreement with Mr. Warren permitting him to use parcel A3 for the business.

[11] It is beyond the proper role of an application judge to determine the credibility of a deponent to resolve material facts which are disputed and which may affect the result: *Moyle v Palmerston Police Services Board* (1995), 25 O.R. (3d) 127 (Div. Ct.) at p. 136, *Yoo v. Kang*, [2002] O.J. 4041 (S.C.J.) at para. 24.

[12] The credibility issue that arose between Ms. Warren and Mr. Hale was pivotal to the result of the application. If Ms. Warren were to be believed, a discontinuance of the claimed legal nonconforming use would be established. In my view, the application judge should have directed the trial of an issue rather than resolving the credibility issue herself.

[13] During the hearing of the appeal, a question arose as to the legal effect of a statutory declaration given on behalf of the Warrens that their lands would be used only for agricultural purposes as permitted by the zoning bylaw. The statutory declaration was required by the Durham Land Division Committee as a condition to the granting of a severance of parcel A3 from the other A parcels. It was given and registered while the Warrens were owners of the A parcels. The Warrens subsequently conveyed parcel A3 to Newcastle. The Hales claim only an oral license from the Warrens to use parcel A3 for their business.

[14] While the resolution of this legal question may well be determinative of the respondents' application in respect of parcel A3, it is best decided at the trial of the issue on a full evidentiary record. It would be unfair to decide the appeal on an issue not raised by the parties and which the respondents had not been prepared to argue.

Parcels B1 and B2

[15] As noted, Clarington recognizes that the respondents have the right to operate an auto wrecking and tire storage business on parcels B1 and B2. The issue is whether the operation

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of a scrapyard, landfill, and garbage collection and/or garbage transfer business on these parcels is a nonconforming use.

[16] The application judge's conclusion regarding the B parcels is unclear. At para. 127 of her reasons she states that she is "satisfied the applicants have established legal nonconforming use on parcel B2 for bringing and storing 'white goods', such as fridges and stoves on parcel B1 and B2 before being recycled". This conclusion is apparently contradicted at para. 135, where she states: "the application is denied in respect of parcel B1 and B2. The legal nonconforming use of depositing white goods and scrap metal that arose prior to the passage of the 1968 zoning bylaw has since been discontinued by admission of the applicant".

[17] Paragraph 3 of the formal judgment, which dismisses Newcastle's application except in regard to parcel A3, is consistent with the conclusion at para. 135. However, the dismissal of Clarington's counter-application might be argued to be consistent with para. 127.

[18] Fortunately, it is unnecessary to decide whether the apparently contradictory reasons of the application judge contain a typographical error, as I am satisfied the record discloses a material credibility issue regarding the B parcels that requires the trial of an issue.

[19] The application judge noted, at para. 121, that Officer Creamer observed, during an inspection of parcels B1 and B2 during 1998 that there were "... among other things, large piles of fridges and other white goods, some drums, assorted tires, large piles of scrap car parts and pieces, radiators, fenders, body parts, miscellaneous sighting, paneling, small propane tanks, tricycles, microwave ovens, pipes, garden chairs, bicycles, highway exit signs, fencing and computers".

[20] However, the application judge stated, at para. 122, that she preferred Billy Hale's evidence "that no scrap was deposited in parcel B after 1974 and find that any scrap found on the property was deposited there before the use was discontinued in 1974, as there is no credible evidence to refute this".

[21] She then went on to conclude in para. 127 that the first charge of the bylaw violation in respect to parcels B1 and B2 was not made out as "the evidence doesn't establish a resumption of depositing scrap metal after 1972".

[22] However, as the appellant points out, Billy Hale on cross-examination admitted to "constantly removing and depositing scrap on parcels B1 and B2 …" after 1974. In addition, there was the evidence of Wendy George, which the application judge summarized at paragraph 67 as follows:

> Wendy George, employed by the Hales since 1989 to work in their office, deposed that between 1993 and 1998, Newcastle

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> Recycling Ltd.'s operation occurred most intensely on parcels B1, B2 and A3, but various operators were also instructed to dump their loads of scrap or other times [*sic*] for disposal on the southern end of Lot 12, namely parcels E1, E2, and E3."

[23] As the application judge notes, Ms. George was not cross-examined.

[24] In my view, the application judge, faced with this competing evidence, should have directed the trial of an issue. When the scrap presently on the B parcels was dumped is material to the determination of the application and counter-application.

Parcels E1, E2, and E3

[25] The application judge did not have to resolve any issues of credibility in finding that parcel E3 was always used for farming and had never been used for any of the disputed uses.

[26] Nor did the application judge have to resolve any issues of credibility in reaching the conclusion that any legal nonconforming use of parcels E1 and E2 ceased when Laidlaw Waste Systems Ltd. ("Laidlaw") was the owner of the E parcels. She found that Laidlaw capped the landfill mounds and there was a period of at least a year without any landfill or any other activity.

[27] The position of the respondents in their cross-appeal, as I understand it, is that it was always their intention to expand their operations southward from parcel A3.

[28] If one accepts all of the respondents' claims, their position is untenable in law. As noted, the respondents sold the A parcels without reservation in 1972. They also sold the E parcels in May of 1987, and did not reacquire them until May of 1998. Any intention the respondents had of expanding their operations on or onto the E parcels expired in May 1987, when they transferred ownership of those parcels to others without reservation. Any intention the respondents had of expanding on to the E parcels after they reacquired the property in 1998 was subject to the zoning provisions of the bylaw.

[29] The respondents attempt to rely on an alleged intention of Laidlaw to expand its landfilling operation. Assuming they can rely on the intention of a previous owner, they face insurmountable problems. First, any intention of expanding that Laidlaw might have had expired when Laidlaw discontinued its legal nonconforming use. Second, there was no admissible evidence of such an intention by Laidlaw.

[30] In my view, the cross-appeal must be dismissed.

Clarington's counter application for an injunction

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[31] The application judge declined to grant Clarington's counter-application for an injunction because, in her view, there was no "compelling evidence that an injunction is warranted in the circumstances".

[32] The issue before the application judge was whether Clarington was entitled to a permanent injunction to enforce a bylaw. It was not necessary for Clarington to lead compelling evidence that the injunction was warranted. Where a municipal authority seeks an injunction to enforce a bylaw which it establishes is being breached, the courts will refuse the application only in exceptional circumstances.

[33] In my view, given that the evidence established that materials were being dumped or deposited on the lot in contravention of the bylaw, Clarington is entitled to the injunction sought in its counter-application in respect of the Lot 12, except in respect of parcels A3, B1 and B2. Its entitlement to a permanent injunction in respect of the A and B parcels is to be decided at the trial of the issues indicated.

The Costs Appeal

[34] The application judge took the view that the respondents were successful before her in that her decision allowed their business operation to continue, albeit on a portion of Lot 12. Therefore she fixed costs in the respondents' favour in the amount of $52,000 inclusive of disbursements and GST.

[35] In view of the results of the appeal and cross-appeal, the costs order cannot stand. That costs order is set aside and the disposition of costs is remitted to be decided by the judge who hears the trial of the issues ordered.

CONCLUSION

[36] For these reasons, I would grant the appeal, and order the trial of issues before a different judge to determine whether there is a legal nonconforming use on parcels A3, B1 and B2. I would dismiss the cross-appeal, and vary the judgment below to grant a permanent injunction in respect of Lot 12 with the exception indicated.

[37] I would fix costs of the appeal and cross appeal in favour of Clarington on a partial indemnity scale in the amount of $20,000 inclusive of disbursements and G.S.T.

"R.G. Juriansz J.A.
"I agree E.E. Gillese J.A."
"I agree R.A. Blair J.A."

RELEASED: December 14, 2005

2005 CanLII 46384 (ON CA)

TAB 9

Federal Court Decisions

Canada v. IPSCO Recycling Inc.

Court (s) Database: Federal Court Decisions
Date: 2003-12-23
Neutral citation: 2003 FC 1518
File numbers: T-2274-00

Date: 20031223

Docket: T-2274-00

Citation: 2003 FC 1518

Ottawa, Ontario, Tuesday, the 23rd day of December 2003

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

IPSCO RECYCLING INC. and GENERAL SCRAP &

CAR SHREDDER LTD., now known as JAMEL METALS INC.,

carrying on business as a partnership under the firm name and style of

GENERAL SCRAP PARTNERSHIP and XPOTENTIAL PRODUCTS INC.,

JACOB LAZARECK AND MELVIN LAZARECK

Respondents

REASONS FOR ORDER AND ORDER

DAWSON J.

[1] In this application Her Majesty The Queen, as represented by the Minister of the Environment ("applicant" or "Environment Canada"), seeks a permanent, mandatory injunction against the respondents pursuant to section 311 of the *Canadian Environmental Protection Act*, 1999, 46-47-48 Eliz. II, c. 33 ("Act"). The injunction sought is one which would require the respondents, and their agents and servants, to store all PCB material at the business premises of General Scrap & Car Shredder Ltd. and XPotential Products Inc. that is currently lying in open piles or otherwise improperly stored, in containers that provide sufficient durability and strength to prevent the PCB solids and PCB substances from being affected by the weather or released.

[2] These reasons are lengthy. In them I conclude that upon the totality of the evidence Environment Canada has failed to meet its burden to establish on a balance of probabilities that it appears that the respondents have committed an offence under the Act by improperly storing PCB material. In consequence, the application for injunctive relief is dismissed. For ease of reference, the following is an index of the headings and sub-headings pursuant to which these reasons are organized, and the paragraph numbers where each section begins.

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I. BACKGROUND FACTS

(i) The Parties

[3] The respondents General Scrap Partnership ("General Scrap") and XPotential Products Inc. ("XPotential") carry on recycling businesses.

[4] General Scrap is a partnership originally formed between IPSCO Recycling Inc. ("IPSCO") and Jamel Metals Inc. ("Jamel"). Jamel is the corporate successor of General Scrap & Car Shredder Ltd. It was the uncontradicted evidence of the only witness who has personal knowledge of the corporate structure of the respondents that currently IPSCO owns 100 percent of General Scrap. I accept this to be the case.

[5] Jacob and Melvin Lazareck are brothers who are the officers, directors and shareholders of Jamel. Jacob Lazareck testified, and I accept, that neither he nor his brother are now involved in the operation of the day-to-day business of General Scrap. Jacob Lazareck is the sole owner, officer, director and operator of XPotential.

(ii) General Scrap and its business

[6] In 1967, General Scrap & Car Shredder Ltd. began operation of the first automobile shredder in Canada on Springfield Road, in Winnipeg ("General Scrap site"). General Scrap continues to operate the shredder at this site.

[7] An automobile shredder is a large, industrial machine powered by a high-horsepower motor. Scrap (for example, automobiles or large appliances) is fed into the shredder opening. The high-horsepower motor turns a series of rotating discs at great speed. Fitted on the discs are a series of large steel hammers which physically shred the scrap fed into the shredder into fist-sized pieces. The shredded material then passes through a magnetic drum which separates the ferrous metals from the remaining non-ferrous material. Non-ferrous metals (for example, copper and aluminum) are recovered during further downstream processing. The remaining non-metallic material is known in the industry as automobile shredder residue ("ASR").

[8] ASR is very heterogeneous material. It is solid and generally medium to dark brown in colour. It is largely made up of plastic and foam but also contains pieces of metal, rubber, fabric, carpet, wood, wire, glass, dirt and other materials. Individual components of ASR vary in size from fine dirt to pieces of foam, fabric and rubber over one foot in size. Individual objects are generally identifiable in the material.

[9] PCBs were banned from use in Canada in 1977. Prior to this, components containing quantities of PCBs were used in the manufacture of automobiles and household appliances. PCBs were used as additives in paints, rubber, foam, sealants and plastics. Quantities of PCBs can be found in automobile ignition systems, household appliance capacitors, wiring and transformer components, electric motors, air-conditioners and hydraulic devices. When older vehicles and appliances are shredded, the PCBs that they may contain remain in the ASR in low concentrations. A small electrical component containing only 500 grams of PCBs can contaminate up to 10 tonnes of ASR to a PCB concentration above the regulatory threshold.

[10] Given the difference in materials that might comprise the shredder input from one load to another, the degree of contamination with PCBs varies in ASR. PCB contaminated ASR can be expected to be found in varying amounts and varying levels of contamination throughout ASR the storage piles. Mr. Lazareck acknowledged that there may be "hot spots" or small areas of concentration that could be over 50 ppm. As is discussed below, 50 parts per million ("ppm") is the regulatory threshold.

[11] Approximately 20,000 metric tonnes of ASR is stored at the General Scrap site. The ASR is located in three areas which have been identified by Environment Canada as the "East Pile", "West Pile" and the "Central Pile". Much of the material is located below the natural grade level because it was used as fill in low-lying areas. The elevation above grade level of each of the East and West Piles is approximately 2 metres. The Central Pile is not the subject of any complaint in this proceeding.

[12] The ASR in the three piles at the General Scrap site was generated from approximately 1969 to 1978. Since around 1994 no new ASR has been added to those piles. New ASR is transported directly to the XPotential site, as described below.

(iii) XPotential and its business

[13] XPotential was incorporated in order to take advantage of a new recycling technology which permits the combination of ASR with post-consumer waste plastics in order to produce saleable products such as parking curbs, landscape crossings, fence posts, railroad ties and non-structural timbers.

[14] XPotential operates a facility approximately one mile east of the General Scrap site ("XPotential site"). The site consists of a plant and a storage cell area. ASR supplied by General Scrap is stored in storage cells for later use as raw material. The Manitoba Department of Environment (now known as Manitoba Conservation) licensed the construction of the plant and the movement of ASR to the storage cells at the XPotential site. XPotential reports regularly to Manitoba Conservation with respect to groundwater monitoring wells maintained at the XPotential site. Manitoba Conservation has expressed no concern to XPotential about PCBs on its site, notwithstanding knowledge of this application brought by Environment Canada.

[15] Since July of 1996, XPotential has received approximately 125,000 tonnes of freshly produced ASR from General Scrap. This is stored in the storage cell area at the XPotential site. Newly produced ASR from General Scrap continues to be transported to the XPotential site where it is used in its manufacturing process.

[16] The storage cell area is essentially one large storage area divided into several compartments or cells. The cells are excavated to a depth of 2 metres below natural grade and native clay is compacted to construct 2 metre high berms between the cells and along the perimeter of the cells. The area of the cells is divided into 6 ASR storage cells, a drying cell (where ASR can be air-dried prior to processing) and a separate excess water retention cell. Environment Canada has advised that the ASR contained in cell 4, cell 5 and the drying cell are of concern. The ASR in each of these cells is comprised of ASR that had been stored at the General Scrap site for several years and newer material.

(iv) PCB Materials

[17] The *Storage of PCB Material Regulations*, SOR/92-507 ("Regulations") define material containing over 50 ppm of PCBs to be "PCB material". PCB materials in an amount of 100 kg or more must be stored, reported, labelled and handled in accordance with the Regulations. Failure to comply with the Regulations is an offence under the Act.

(v) The Dispute Between the Parties

[18] In September of 1997, Environment Canada informed the respondents that it was Environment Canada's intention to conduct inspections at the General Scrap and the XPotential sites and to take samples of ASR for analysis in order to determine the PCB content of the ASR.

[19] As a result, General Scrap and XPotential instructed Wardrop Engineering Inc. ("Wardrop") to conduct an ASR sampling and analysis program. The purpose of the program was to determine whether the ASR at both the General Scrap and XPotential sites were PCB materials within the meaning of the Regulations.

[20] In consequence of those instructions, Wardrop produced a report dated October 16, 1997 which described the collection and analysis of 24 samples of ASR that Wardrop collected at the XPotential and General Scrap sites. Wardrop concluded, among other things, that:

1. PCB concentrations in the samples analyzed ranged from 8 to 49 ppm.

2. At an 80% statistical confidence interval the PCB concentration of the ASR was between 20.9 and 27.5 ppm, which was below the regulatory threshold.

[21] These results were communicated to Environment Canada October 17, 1997.

[22] Environment Canada proceeded with its own investigation and collection of samples. Wardrop was engaged by General Scrap and XPotential to take duplicate samples from the locations at which Environment Canada took samples. Samples were taken from both sites over the period of October 20, 1997 to October 23, 1997.

[23] In a report dated September-December 1997 ("1997 Environment Canada Report"), Environment Canada identified PCB at mean concentrations above the regulatory limit of 50 ppm at three locations. They were the West Pile at the General Scrap site (85.4 ppm) and storage cells 5 and 6 at the XPotential site (respectively, 61.3 and 96.7 ppm). Wardrop was

engaged by General Scrap and XPotential to have those duplicate samples that were taken alongside the Environment Canada samples for each of the West Pile and cells 5 and 6 analyzed for PCB concentration.

[24] The second report prepared by Wardrop as a result of this engagement concluded, among other things, that:

1. The concentration of ASR in the duplicate samples ranged from 10 to 42 ppm;

2. For the West Pile, the 95% statistical confidence interval placed the PCB concentration between 30.6 and 38.0 ppm;

3. For cell 5, the sole sample showed a PCB concentration of 34 ppm; and

4. For cell 6, the 95% statistical confidence interval placed the PCB concentration between 11.9 and 26.7 ppm.

[25] Wardrop concluded that the ASR in question did not have a PCB concentration above the regulatory threshold.

[26] In February of 1998, Environment Canada sent a letter to the respondents advising that on the basis of the 1997 Environment Canada Report it had determined that General Scrap and XPotential were storing PCB materials in violation of the Regulations. However, the analytical protocol used by Environment Canada which resulted in the 1997 Environment Canada Report was not the protocol referenced in the Regulations. Therefore, Environment Canada later concluded that it could not rely upon its 1997 report for enforcement purposes. Environment Canada therefore agreed to withdraw its determination that General Scrap and XPotential were storing PCB materials in violation of the Regulations.

[27] In September of 1998, Environment Canada advised that it would be conducting another round of sampling and analysis. Representatives of Environment Canada attended at the General Scrap and XPotential sites to conduct a sampling program from September 21 to September 25, 1998. The activities of Environment Canada were monitored by an environmental engineer employed by Wardrop and by staff of General Scrap and XPotential.

[28] By December of 1998, General Scrap and XPotential retained the services of Dillon Consulting Limited ("Dillon") in order to facilitate discussions with Environment Canada in an attempt to resolve the outstanding issues.

[29] In January of 1999, Environment Canada's final sampling report ("1999 Environment Canada Report") was issued. This report indicates that two ASR piles at the General Scrap site and three of the four storage areas at XPotential had average PCB concentrations that exceeded 50 ppm. The average PCB concentrations for the PCB contaminated piles, along with the 95% confidence (probability) ranges were as follows:

Average (Absolute minimum)	95% Probability (lower value to upper value)
General Scrap	
East pile 59.7 ppm	67.0 to 82.8 ppm
Central pile 41.2 ppm	46.3 to 57.1 ppm
West pile 54.6 ppm	61.3 to 75.7 ppm
XPotential	
Cell 4 65.3 ppm	73.3 to 90.6 ppm
Cell 5 50.7 ppm	56.9 to 70.3 ppm
Cell 6 42.0 ppm	47.2 to 58.3 ppm
Drying Cell 50.8 ppm	57.0 to 70.5 ppm

[30] On February 8, 1999, the 1999 Environment Canada Report was forwarded by Environment Canada to General Scrap.

[31] In April of 1999, General Scrap and XPotential advised Environment Canada that:

1. General Scrap and XPotential would undertake a further sampling and characterization of the ASR identified by Environment Canada as PCB material;

2. General Scrap would implement a procedure to identify common sources of PCBs in its scrap and to take steps to control PCB imports by requiring its suppliers first to remove potential PCB sources from household appliances analytical equipment before delivery to General Scrap.

3. Soil and groundwater data would be assembled from the General Scrap and XPotential sites contiguous to ASR storage and would be provided to Environment Canada.

4. General Scrap committed to continue to monitor new and emerging practical, economically achievable technologies for low-level PCB removal from ASR.

[32] Environment Canada responded by letter dated April 30, 1999. In this correspondence Environment Canada took the position that General Scrap had failed to provide a detailed compliance plan with specific steps and time frames for putting this plan into effect. This was taken by Environment Canada to evidence a lack of commitment towards coming into compliance with the Regulations.

[33] Jan Merks of Matrix Consulting Limited was engaged by General Scrap and XPotential as an expert consultant to assist Dillon in the design of the sampling program and in the interpretation of the data generated from the sampling and analysis.

[34] In September of 1999, General Scrap and XPotential informed Environment Canada that Dillon had prepared a sampling program which it intended to initiate commencing on September 27, 1999. This program had been completed with the assistance of Mr. Merks.

[35] Dillon carried out the sampling plan between September 27 and October 8, 1999 and began by sampling cell 5 at the XPotential site. Dillon applied three different sampling methods with a view to determining which method would provide the most accurate results. The first method replicated Environment Canada's method of direct sample selection (for comparison purposes), the second method used a mechanically split discrete sample, and the third method used mechanically split interleaved, composite samples. On the basis of this sampling and the analysis of the resulting data Dillon subsequently recommended a protocol to be followed in the final sampling and analysis of ASR at the General Scrap and XPotential sites.

[36] On May 17, 2000, representatives of General Scrap, Dillon and XPotential met with an Environment Canada enforcement officer to review the results of the sampling and analysis of cell 5 and to advise that the remaining sampling analysis would proceed in accordance with the plan developed by Dillon.

[37] On June 14, 2000, Environment Canada advised that it was unwilling to provide any comments on the proposed ASR sampling and analysis procedures proposed by Dillon.

[38] General Scrap and XPotential instructed Dillon to proceed with the sampling and analytical protocol that Dillon proposed. In July of 2000, Environment Canada was advised that the remaining sampling and analysis was proceeding.

[39] Environment Canada commenced these proceedings on December 6, 2000. Prior to seeking injunctive relief no other enforcement options available under the Act were pursued by Environment Canada.

[40] The results of Dillon's sampling and analytical program are contained in a report prepared by Dillon dated January 2001. Dillon concluded that the ASR of concern to Environment Canada stored within the General Scrap - East Pile, General Scrap - West Pile, XPotential cells 4 and 5 and the XPotential drying cell, do not contain mean concentrations of PCBs above the federal or provincial regulatory threshold of 50 ppm.

(vi) Current Status of the ASR in Issue

[41] In response to an application for an interim injunction made by Environment Canada regarding the storage and handling of the ASR at issue pending the determination of this application, the respondents agreed to the terms of a consent order setting out the manner in which the ASR at issue would be dealt with. The consent order was entered into with no admission by the respondents that the ASR at issue is PCB material under the Regulations.

(vi) The Specific Order Sought by the Applicant

[42] The applicant says that it is not possible to determine visually which location in the problematic piles and cells have concentrations of PCB over 50 ppm. However, the applicant also says that regulatory compliance requires the PCB material to be identified and then stored, labelled, reported and handled in accordance with the Regulations.

[43] Accordingly, in its written materials the applicant seeks an injunction on the following terms:

a) All of the ASR in the East and West Pile at General Scrap, and all of the ASR in Cells 4, 5 and the Drying Cell at XPotential must be considered to be PCB Material, unless and until those areas that are under regulatory threshold are identified and separated from the Piles and Cells;

b) Any protocol for the sampling, analysis and identification of non-PCB Material must be carried out by a third party under the direction and supervision of Environment Canada and at the expense of the Respondents;

c) The remaining PCB Material must be stored or disposed of in accordance with the *PCB Regulations*.

[44] Alternatively, the applicant seeks an injunction on such other or further terms as the Court considers just. No such terms were suggested. The notice of application seeks an order compelling the respondents to store all PCB material as required by law.

II. THE ISSUES

[45] In order to determine whether the injunction requested should issue, the following issues must be considered:

i) What are the requirements which must be met in order to be entitled to obtain an injunction pursuant to subsection 311(1) of the Act and what is the scope of subsection 311(1)?

ii) Is some or all of the ASR PCB material as defined in the Regulations so that some or all of the respondents are in breach of the Regulations?

iii) If so, which respondents are in breach of the Regulations? and

iv) Should the Court grant the requested injunction?

III. ANALYSIS

(i) What are the requirements to be met in order to obtain injunctive relief under subsection 311(1) of the Act and what is the scope of subsection 311(1)?

[46] Counsel advise that this is the first occasion on which a court has considered a request for injunctive relief under subsection 311(1) of the Act. Section 311 of the Act is as follows:

311(1) Where, on the application of the Minister, it appears to a court of competent jurisdiction that a person has done or is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under this Act, the court may issue an injunction ordering any person named in the application

(a) to refrain from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence under this Act; or

(b) to do any act or thing that it appears to the court may prevent the commission of an offence under this Act.

311(2) No injunction shall be issued under subsection (1) unless 48 hours notice is given to the party or parties named in the application or the urgency of the situation is such that service of notice would not be in the public interest.

311(1) Si, sur demande présentée par le ministre, il conclut à l'existence, l'imminence ou la probabilité d'un fait constituant une infraction à la présente loi, ou tendant à sa perpétration, le tribunal compétent peut, par ordonnance, enjoindre à la personne nommée dans la demande_:

a) de s'abstenir de tout acte susceptible, selon lui, de perpétuer le fait ou d'y tendre;

b) d'accomplir tout acte susceptible, selon lui, d'empêcher le fait.

311(2) L'injonction est subordonnée à la signification d'un préavis d'au moins quarante-huit heures aux parties nommées dans la demande, sauf lorsque cela serait contraire à l'intérêt public en raison de l'urgence de la situation.

(a) Is subsection 311(1) to be limited to exceptional cases?

[47] The respondents' fundamental argument with respect to the application of section 311 is that the Act in its entirety is enacted pursuant to Parliament's jurisdiction over criminal law matters. It follows, they submit, that the jurisdiction of the court to grant an injunction in aid of criminal law is a jurisdiction to be used with caution and only in the most exceptional of cases. Reliance is placed upon authorities such as *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 (H.L.), *Ontario (Attorney General) v. Ontario Teachers' Federation* (1997) 36 O.R. (3d) 367 (H.C.) and *Attorney General for the Province of Ontario v. Hale* (*c.o.b. Hale Sand and Gravel*), (1983) 38 C.P.C. 292 (On. H.C.). The respondents say that the exercise of this exceptional jurisdiction has been confined to cases where a law has been repeatedly flouted, the alleged breach of law is clear, and the enforcement provisions of the statute in question have proven ineffective.

[48] With respect, I find the authorities relied upon by the respondents to be distinguishable. In the cases cited by the respondents there was either no specific legislative provision which authorized injunctive relief, or, as in *Hale, supra*, the statutory provision which provided for injunctive relief was not applicable. Therefore, in all of the cases what was in issue was the right of an Attorney General to sue at common law in order to attempt to enforce a law by way of injunction.

[49] The nature of an injunction available at common law to an Attorney General in order to enforce public rights is well described by Justice MacPherson in *Ontario Teachers' Federation, supra*. This remedy reflects the role of the Attorney General in securing compliance with the laws of the land. Courts have held this to be a remedy granted in exceptional cases.

[50] There is, however, a significant distinction between an injunction authorized by statute and an injunction available to the Attorney General at common law. This distinction is aptly illustrated in *Ontario (Minister of the Environment) v. National Hard Chrome Plating Co.* (1993), 11 C.E.L.R. (N.S.) 73 (Ont. C. of J.). There, the statutory provision with respect to the granting of an injunction contemplated an injunction to "restrain" contravention of the statute. The Court concluded that because the statute only provided a basis for the issuance of a prohibitory injunction, a mandatory injunction was only available at common law at the request of the Attorney General suing in the public interest. Such common law relief was available only where the law was being flouted and the legislation was inadequate to protect the public interest.

[51] On the basis of the authorities cited by the parties I am satisfied that where a statute provides a remedy by way of injunction, different considerations govern the exercise of the court's discretion than apply when an Attorney General sues at common law to enforce public rights. The following general principles apply when an injunction is authorized by statute:

i) The court's discretion is more fettered. The factors considered by a court when considering equitable relief will have a more limited application. See: *Prince Edward Island (Minister of Communications and Cultural Affairs) v. Island Farm and Fish Meat Ltd.,* [1989] P.E.I.J. No. 32 (P.E.I.S.C.); *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 162 D.L.R. (4th) 203 (B.C.C.A.).

ii) Specifically, an applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused. See: *Shaughnessy Heights Property Owners' Association v. North Up* (1958) 12 D.L.R. (7d) 760 (B.C.S.C.); *Manitoba Dental Association v. Byman and Halstead* (1967) 34 D.L.R. (2d) 602 (Man. C.A.); *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press,* [2000] N.S.J. No. 139 (N.S.S.C.).

iii) There is no need for other enforcement remedies to have been pursued. See: *Saskatchewan (Minister for Environmental Assessment Act) v. Redberry Development Corporation,* [1987] 4 W.W.R. 654 (Sask. Q.B.).

iv) The Court retains a discretion as to whether to grant injunctive relief. Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed. However, an injunction will not issue where it would be of questionable utility or inequitable. See: *Saskatchewan (Minister of Environmental Assessment Act) v. Redberry, supra; Maple Ridge (District) v. Thornhill Aggregates Ltd., supra; Capital Regional District v. Smith* (1998), 168 D.L.R. (4th) 52 B.C.C.A.

v) It remains more difficult to obtain a mandatory injunction. See: *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press, supra.*

(b) The constituent elements of subsection 311(1)

[52] Having rejected the respondents' argument that relief pursuant to section 311 of the Act is only available upon proof that the law has been repeatedly flouted and that other enforcement provisions of the statute have proven ineffective, I turn to consider what must be established in order to permit the Court to issue a mandatory injunction.

[53] The starting point for the interpretation of subsection 311(1) of the Act is the following well-known and accepted statement of principle:

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.

See: E.A. Driedger in *Construction of Statutes* (2nd ed. 1983) at page 87 as cited in *Chieu v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 84 at paragraph 27.

[54] This approach requires a court to attribute to a legislative provision the meaning that best accords with both the text and the context of the provision. While neither can be ignored, as the Federal Court of Appeal observed in *Bristol-Myers Squibb Co. v. Canada (Attorney General),* 2003 FCA 180 at paragraph 13, the clearer the ordinary meaning of the provision, the more compelling the contextual considerations must be in order to warrant a different reading.

[55] Before beginning this analysis it is convenient to again set out the text of subsection 311(1) of the Act:

311(1) Where, on the application of the Minister, it appears to a court of competent jurisdiction that a person has done or is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under this Act, the court may issue an injunction ordering any person named in the application

(a) to refrain from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence under this Act; or

(b) to do any act or thing that it appears to the court may prevent the commission of an offence under this Act.

311(1) Si, sur demande présentée par le ministre, il conclut à l'existence, l'imminence ou la probabilité d'un fait constituant une infraction à la présente loi, ou tendant à sa perpétration, le tribunal compétent peut, par ordonnance, enjoindre à la personne nommée dans la demande_:

a) de s'abstenir de tout acte susceptible, selon lui, de perpétuer le fait ou d'y tendre;

b) d'accomplir tout acte susceptible, selon lui, d'empêcher le fait.

1. <u>The Text - Grammatical and Ordinary Sense</u>

[56] An ordinary reading of subsection 311(1) leads to the interpretation that for an injunction to issue it must appear to a court that either:

i) the respondent has done any act or thing constituting an offence under the Act, or done any act or thing that is directed toward the commission of an offence; or

ii) the respondent is about to do, or is likely to do, any act or thing that constitutes an offence under the Act or is directed toward the commission of an offence.

[57] If so satisfied, the court may:

i) issue a prohibitory injunction restraining the respondent from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence; or

ii) issue a mandatory injunction requiring the respondent to do any act or thing that it appears to the court may prevent the commission of an offence.

<u>The Text as it Speaks to the Requisite Standard of Proof</u>

[58] The respondents argue that the Act requires proof beyond a reasonable doubt of the facts giving rise to the commission of an offence. In my view, the language used in subsection 311(1), read in its grammatical and ordinary sense, does not support this conclusion. I so conclude because the provision speaks to the situation where "it appears to a court" that an act or thing has occurred or is about to occur or is likely to occur, and that act or thing constitutes or is directed toward the commission of an offence. If proof beyond a reasonable doubt of the commission, or likely commission, of an offence was

required it is reasonable to infer that Parliament would have used more specific language in the nature of "where it is established that a person has done or is about to do or is likely to do any act or thing constituting an offence".

[59] Further, the court may restrain any act or thing that "appears to the court may constitute or be directed toward the commission of an offence". The court may order anything to be done that "may prevent the commission of an offence". This wording again falls short of requiring proof beyond a reasonable doubt that an offence has occurred or is about to occur or is likely to occur.

[60] Moreover, the wording used in subsection 311(1) is to be contrasted with that found in section 39 of the Act. Section 39 permits a person who suffers, or is about to suffer, loss or damage "as a result of conduct that contravenes any provision of this Act" to apply to a court for injunctive relief. Section 39 therefore requires that the court be satisfied that loss or damage results from conduct that "contravenes the Act" in order to grant injunctive relief. The use of wording in subsection 311(1) which only requires that it "appears" that an offence has occurred, or is about to or likely to occur, must be taken to reflect Parliament's intent that a lower degree of proof is required under section 311 than is required under section 39. That lower degree of proof would not equate to proof beyond a reasonable doubt, or even proof at the high end of the civil standard.

[61] In so concluding, I have considered the respondents' argument that section 29 of the Act supports the conclusion that section 311 requires proof to the criminal standard. Section 29 provides:

29. The offence alleged in an environmental protection action and the resulting significant harm are to be proved on a balance of probabilities.	29. Dans une action en protection de l'environnement, la charge de prouver l'existence de l'infraction et l'atteinte à l'environnement qui en découle repose sur la prépondérance des probabilités.

[62] The respondents argue that because section 311 and related provisions contain no similar provision invoking the civil standard, the standard of proof must be intended to be the criminal standard.

[63] However, it is significant, in my view, that an environmental protection action referenced in section 29 may only be brought by a person who has applied to the Minister for an investigation of an offence and the Minister has either failed to investigate and report as required or has responded unreasonably to the investigation. An environmental protection action is therefore a form of substitution for a proper investigation of an alleged offence. The gravamen of the action is proof of an offence. In that circumstance, the need for clarification of the standard of proof is apparent. Viewed in this context I am not prepared to infer from the absence of a similar provision applicable to section 311 that the criminal standard of proof was intended to apply to section 311.

[64] To conclude on this point, I also observe that nothing in section 311 indicates that the application commenced by the Minister is criminal in nature so as to attract the criminal standard of proof.

[65] On the other hand, Environment Canada asserts that it need only establish that there is reason to believe that a violation of the Act is occurring. It is said by Environment Canada that in the absence of an express statutory requirement it is not necessary for it to prove reasonable and probable grounds for that belief. In the words used in Environment Canada's written submission:

31. Environment Canada need only prove that they [*sic*] have reason to believe a violation of the Act is occurring. Unless the statute indicates otherwise, reasonable and probable grounds for such belief or actual proof of the violation is not required.

***Prince Edward Island (Minister of Community and Cultural Affairs) v. Island Farm and Fish Meal Ltd.* (1989), 79 Nfld. & P.E.I.R. 228 (P.E.I.C.A.)**

[66] While I reject the respondents' submission that what is required is proof beyond a reasonable doubt of facts giving rise to the commission of an offence, I also reject the submission of Environment Canada that it is not necessary for it to establish reasonable and probable grounds upon which to base a belief that a violation of the Act has occurred, or will occur, or will likely occur.

[67] The ordinary meaning of the words used in subsection 311(1) places the onus on the Minister, as moving party, to satisfy a court of competent jurisdiction that it appears that an act or thing constituting or directed toward the commission of an offence has occurred or is about to occur or is likely to occur. If so satisfied the court may enjoin any act or thing that it appears may constitute or be directed toward the commission of an offence. Alternatively, the court may mandate any act or thing that it appears may prevent the commission of an offence. While the language used falls short of requiring proof that an offence has occurred or will occur, it is necessary for the court at least to come to a *bona fide* belief, on a balance of probabilities, that a serious possibility exists that an offence has been committed, or is likely to be committed, or conduct directed toward the commission of an offence has occurred or will likely occur unless an injunction is issued. Unless the court is so satisfied, the Minister will have failed to establish the existence of facts that make the commission of an offence or conduct furthering an offence appear likely. The court's belief must be based on credible evidence, and any inferences that such evidence properly supports. The onus is upon the Minister to meet that burden.

[68] I do not find the *Island Farm and Fish Meal* case relied upon by Environment Canada to assist its position. This case turned upon the wording of the specific provincial legislation which expressly allowed a ministerial order to be issued simply where the Minister had reason to believe that a violation had occurred. The case is not authority for any broader proposition applicable to subsection 311(1) because of differences in the language used in each statute.

The Text as it Speaks to the Prevention of Offences

[69] Environment Canada submits that the language of subsection 311(1) when read in its entirety is directed toward the prevention of offences under the Act. I agree. It does so by allowing a court to prohibit acts or things that may constitute or be directed to the commission of an offence and by allowing a court to order that any act or thing be done where it appears that the resulting effect of the order may prevent the commission of an offence.

[70] For example, in the case of a single discrete act that constitutes or may constitute an offence under the Act, on proper evidence the court could enjoin the act or could order that any act or thing be done so as to prevent the occurrence of the offence. However, if that single, discrete act had already taken place, there would be no scope for the application of subsection 311(1) because there would be no act to restrain and no way to prevent the commission of an offence after the fact.

[71] What then of the case where a past or present act has a present and ongoing effect? For example, if the ASR at issue now constitutes, in whole or in part, PCB material can prohibitory or mandatory injunctive relief be granted?

[72] Environment Canada argues that in such a situation a court may (pursuant to paragraph 311(1)(*a*) of the Act) by injunction require a respondent to discontinue acting in a manner that constitutes or is directed to the commission of an offence. The ordinary meaning of the words used in paragraph 311(1)(*a*) support that submission in the following manner.

[73] The offence at issue in this case is the alleged failure to store PCB material in conformance with the Regulations. This is an offence pursuant to paragraph 272(1)(*a*) of the Act, which makes it an offence to contravene a provision of a regulation to the Act. Paragraph 311(1)(*a*) would therefore apply where, to paraphrase the language of the provision, it appears to the court that a person has stored PCB material in contravention of the Regulations. In that circumstance, the court could order that the respondents refrain from storing PCB material in contravention of the Regulations because this non-compliant form of storage would constitute the commission of an offence. While the English version is not explicit with respect to an ongoing situation, the French version of paragraph 311(1)(*a*) expressly provides that one may be ordered to abstain from all acts capable of continuing or perpetuating an offence. Thus, the use of the phrase "de s'abstenir de tout acte susceptible [...] de perpétuer le fait [...]".

[74] In this type of situation, the court could as well order pursuant to paragraph 311(1)(*b*) that the material be stored in accordance with the Regulations if satisfied that this would "prevent the commission of an offence".

[75] In this connection, Environment Canada argues that the offence of improper storage of PCB materials is an offence of a continuous nature as contemplated by section 276 of the Act. Section 276 provides:

Where an offence under this Act is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which it is committed or continued.	Il peut être compté une infraction distincte à la présente loi pour chacun des jours au cours desquels se commet ou se continue l'infraction.

[76] It follows in the present case, in the submission of Environment Canada, that while any offence of failing to comply with the Regulations occurred before the proceeding was commenced, it continues to occur. So long as PCB material remains stored in a manner inconsistent with the Regulations, Environmental Canada argues that the offence continues and a fresh, separate and discrete offence occurs each day. Thus, a mandatory injunction may issue requiring PCB material to be stored as stipulated in the Regulations in order to prevent the commission of a fresh, separate offence.

[77] In response, the respondents argue that section 276 of the Act does not in its language provide that the continuation of an offence is itself a separate offence. Rather, the section provides that "the person who committed the offence is liable to be convicted for a separate offence for each day on which it is committed or continued". This is said to allow for the multiplication of penalties and for the continuation of any limitation period. The wording used in section 276 is contrasted by the respondents with section 78.1 of the *Fisheries Act*, R.S.C. 1985, c. F-14. The environmental provisions contained in the *Fisheries Act* are noted by the respondents to be administered by Environment Canada. Section 78.1 of the *Fisheries Act* provides:

Where any contravention of this Act or the regulations is committed or continued on more than one day, it constitutes a separate offence for each day on which the contravention is committed or continued.	Il est compté une infraction distincte à la présente loi ou à ses règlements pour chacun des jours au cours desquels se commet ou se continue toute infraction à l'une de leurs dispositions.

[78] The *Fisheries Act* pre-dates the Act and therefore could provide support for the respondents' submission that the wording used in section 276 means something other than the continuation of a contravention of the Act constitutes a separate offence for each day it persists. Notwithstanding that submission, section 276 of the Act does expressly state that the continuation of an offence over more than one day renders the offender liable to be convicted for separate offences.

[79] It is at this point helpful to turn to the contextual factors that aid in the interpretation of subsection 311(1) and that specifically should aid in interpreting whether subsection 311(1) permits the issuance of a mandatory injunction in order to remedy an existing situation.

2. <u>The Context</u>

<u>The Scheme of the Act</u>

[80] The Act may be described as being a comprehensive code respecting pollution prevention and the protection of the environment.

[81] Part 2 of the Act deals with public participation in the administration and enforcement of the Act. An individual who is at least 18 years of age and a resident of Canada may request an investigation of an alleged offence under the Act (section 17). As referred to above, should the responsible Minister fail to conduct an investigation, or respond unfavourably, and if there has been significant harm to the environment, then the individual who requested the investigation may proceed with an environmental protection action (section 22). Subsection 22(3) of the Act provides that in such an action the individual may claim any or all of the following relief:

(a) a declaratory order;

(b) <u>an order, including an interlocutory order, requiring the defendant to refrain from doing anything that</u>, in the opinion of the court, <u>may constitute an offence under this Act</u>;

(c) <u>an order, including an interlocutory order, requiring the defendant to do anything that</u>, in the opinion of the court, <u>may prevent the continuation of an offence under this Act</u>;

(d) an order to the parties to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations within a time set by the court; and

(e) any other appropriate relief, including the costs of the action, but not including damages.

[82] Of significance is the explicit reference in paragraph 22(3)(*c*) to an order "requiring the defendant to do anything that [...] may <u>prevent the continuation of an offence</u>" under the Act. [underlining added]

[83] Section 39 of the Act, also previously referred to, allows a person who suffers, or is about to suffer, loss or damage as a result of conduct contravening the Act to seek an injunction. Such an injunction may require the contravenor to refrain from doing anything that it appears causes or will cause the loss or damage, or may require the contravenor to do anything that it appears prevents or will prevent the loss or damage.

[84] Part 10 of the Act deals with the enforcement of the Act and provides extensive enforcement powers. The responsible Minister may designate enforcement officers who have peace officer powers (section 217). An enforcement officer may enter and inspect any place where there are reasonable grounds to believe there might be a substance or activity regulated under the Act (section 218). During the course of an investigation or search, an enforcement officer may issue an Environmental Protection Compliance Order ("EPCO") where there are reasonable grounds to believe that any provision of the Act or Regulations has been contravened by a person who is continuing the commission of the offence. Section 235 deals with EPCOs and is, in material part, as follows:

235. (1) Whenever, during the course of an inspection or a search, an enforcement officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened in the circumstances described in subsection (2) by a person who is continuing the commission of the offence, or that any of those provisions will be contravened in the circumstances described in that subsection, the enforcement officer may issue an environmental protection compliance order directing any person described in subsection (3) to take any of the measures referred to in subsection (4) and, where applicable, subsection (5) that are reasonable in the circumstances and consistent with the protection of the environment and public safety, in order to cease or refrain from committing the alleged contravention.

235. (2) For the purposes of subsection (1), the circumstances in which the alleged contravention has been or will be committed are as follows, namely,

[...]

(b) the possession, storage, use, sale, offering for sale, advertisement or disposal of a substance or product containing a substance;

[...]

235. (3) Subsection (1) applies to any person who

(a) owns or has the charge, management or control of the substance or any product containing the substance to which the alleged contravention relates or the property on which the substance or product is located; or

(b) causes or contributes to the alleged contravention.

235. (4) For the purposes of subsection (1), an order in relation to an alleged contravention of any provision of this Act or the regulations may specify that the person to whom the order is directed take any of the following measures:

(a) refrain from doing anything in contravention of this Act or the regulations, or do anything to comply with this Act or the regulations;

(b) stop or shut down any activity, work, undertaking or thing for a specified period;

235. (1) Lors de l'inspection ou de la perquisition, s'il a des motifs raisonnables de croire qu'une infraction à la présente loi ou à ses règlements a été commise - et continue de l'être - ou le sera, dans les cas prévus au paragraphe (2), l'agent de l'autorité peut ordonner à tout intéressé visé au paragraphe (3) de prendre les mesures prévues au paragraphe (4) et, s'il y a lieu, au paragraphe (5) qui sont justifiées en l'espèce et compatibles avec la protection de l'environnement et la sécurité publique pour mettre fin à la perpétration de l'infraction ou s'abstenir de la commettre.

235. (2) Les cas de contravention sont_:

[...]

b) leur possession, entreposage, utilisation, vente, mise en vente, publicité ou élimination;

[...]

235 .(3) Pour l'application du paragraphe (1), les intéressés sont les personnes qui, selon le cas_:

a) sont propriétaires de la substance en cause dans la perpétration de la prétendue infraction, d'un produit la contenant ou du lieu où se trouve cette substance ou ce produit, ou ont toute autorité sur eux;

b) causent cette infraction ou y contribuent.

235. (4) L'ordre peut enjoindre à l'intéressé de prendre une ou plusieurs des mesures suivantes_:

a) s'abstenir d'agir en violation de la présente loi ou de ses règlements ou, au contraire, faire quoi que ce soit pour s'y conformer;

b) cesser une activité ou fermer notamment un ouvrage ou une entreprise, pour une période déterminée;

c) cesser l'exercice d'une activité ou l'exploitation d'une partie notamment d'un ouvrage ou d'une entreprise jusqu'à ce que l'agent de l'autorité soit convaincu qu'ils sont conformes à la présente loi ou ses règlements;

d) déplacer un moyen de transport vers un autre lieu, y compris faire entrer un navire au port ou faire atterrir un aéronef à un aéroport;

e) décharger un moyen de transport ou le charger;

(c) cease the operation of any activity or any part of a work, undertaking or thing until the enforcement officer is satisfied that the activity, work, undertaking or thing will be operated in accordance with this Act and the regulations;

(d) move any conveyance to another location including, in the case of a ship, move the ship into port or, in the case of an aircraft, land the aircraft;

(e) unload or re-load the contents of any conveyance; and

(f) take any other measure that the enforcement officer considers necessary to facilitate compliance with the order or to protect or restore the environment, including, but not limited to,

(i) maintaining records on any relevant matter,

(ii) reporting periodically to the enforcement officer, and

(iii) submitting to the enforcement officer any information, proposal or plan specified by the enforcement officer setting out any action to be taken by the person with respect to the subject-matter of the order.[underlining added]

f) prendre toute autre mesure que l'agent de l'autorité estime nécessaire pour favoriser l'exécution de l'ordre ou la protection et le rétablissement de l'environnement, notamment_:

(i) tenir des registres sur toute question pertinente,

(ii) lui faire périodiquement rapport,

(iii) lui transmettre les renseignements, propositions ou plans qu'il précise et qui énoncent les mesures à prendre par l'intéressé à l'égard de toute question qui y est précisée. [Le souligné est de moi.]

[85] An EPCO may therefore direct that a person who is continuing the commission of an offence to "do anything to comply with this Act or the regulations".

[86] A person to whom an EPCO is directed shall immediately on receipt of the order comply with it (subsection 238(1)). An EPCO is valid for up to 180 days (subsection 235(7)). The affected person may make representations to the enforcement officer before the order is issued, or seek review of the order by an independant review officer (sections 243-268). The order remains in effect until the review officer otherwise rules. An appeal from that decision lies to the Federal Court. Where a person fails to take any measures specified in an EPCO an enforcement officer may cause those measures to be taken (subsection 239(1)).

[87] The maximum penalty under the Act for an offence is a fine of up to $1 million dollars per day or up to 5 years imprisonment (subsections 273(2) and 274(1)). A court can also levy a fine equal to any profits earned as a result of the offence. (section 290) Subsection 291(1) of the Act provides that upon conviction for an offence under the Act the court may make additional orders. Subsection 291(1) is as follows:

291. (1) Where an offender has been convicted of an offence under this Act, in addition to any other punishment that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:

(a) prohibiting the offender from doing any act or engaging in any activity that may result in the continuation or repetition of the offence;(b) directing the offender to take any action that the court considers appropriate to remedy or avoid any harm to the environment that results or may result from the act or omission that constituted the offence;

(c) directing the offender to prepare and implement a pollution prevention plan or an environmental emergency plan;

291. (1) En cas de déclaration de culpabilité pour infraction à la présente loi, le tribunal peut, en sus de toute peine prévue par celle-ci et compte tenu de la nature de l'infraction ainsi que des circonstances de sa perpétration, rendre une ordonnance imposant au contrevenant tout ou partie des obligations suivantes :

a) s'abstenir de tout acte ou activité risquant d'entraîner la continuation de l'infraction ou la récidive;

b) prendre les mesures jugées utiles pour réparer le dommage à l'environnement résultant des faits qui ont mené à la déclaration de culpabilité ou prévenir un tel dommage;

c) élaborer et exécuter un plan de prévention de la pollution ou un plan d'urgence environnementale;

(d) directing the offender to carry out environmental effects monitoring in the manner established by the Minister or directing the offender to pay, in the manner prescribed by the court, an amount for the purposes of environmental effects monitoring;

(e) directing the offender to implement an environmental management system that meets a recognized Canadian or international standard;

(f) directing the offender to have an environmental audit conducted by a person of a class and at the times specified by the court and directing the offender to remedy any deficiencies revealed during the audit;

(g) directing the offender to publish, in the manner directed by the court, the facts relating to the conviction;

(h) directing the offender to notify, at the offender's own cost and in the manner directed by the court, any person aggrieved or affected by the offender's conduct of the facts relating to the conviction;

(i) directing the offender to post any bond or pay any amount of money into court that will ensure compliance with any order made under this section;

(j) directing the offender to submit to the Minister, on application by the Minister made within three years after the date of conviction, any information with respect to the offender's activities that the court considers appropriate and just in the circumstances;

(k) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the act or omission that constituted the offence;

(l) directing the offender to perform community service, subject to any reasonable conditions that may be imposed in the order;

(m) directing that the amount of any fine or other monetary award be allocated, subject to the Criminal Code and any regulations that may be made under section 278, in accordance with any directions of the court that are made on the basis of the harm or risk of harm caused by the commission of the offence;

(n) directing the offender to pay, in the manner prescribed by the court, an amount for the purposes of conducting research into the ecological use and disposal of the substance in respect of which the offence was committed or research relating to the manner of carrying out environmental effects monitoring;

(o) directing the offender to pay, in the manner prescribed by the court, an amount to environmental, health or other groups to assist in their work in the community where the offence was committed;

(p) directing the offender to pay, in the manner prescribed by the court, an amount to an educational institution for scholarships for students enrolled in environmental studies; and

d) exercer une surveillance continue des effets d'une substance sur l'environnement, de la façon que le ministre indique, ou verser, selon les modalités prescrites par le tribunal, une somme d'argent destinée à permettre cette surveillance;

e) mettre en place un système de gestion de l'environnement répondant à une norme canadienne ou internationale reconnue;

f) faire effectuer, à des moments déterminés, une vérification environnementale par une personne appartenant à la catégorie de personnes désignée, et prendre les mesures appropriées pour remédier aux défauts constatés;

g) publier, en la forme prescrite, les faits liés à la déclaration de culpabilité;

h) aviser les victimes, à ses frais et en la forme prescrite, des faits liés à la déclaration de culpabilité;

i) consigner telle somme d'argent jugée convenable, en garantie de l'exécution des obligations imposées au titre du présent article;

j) fournir au ministre, sur demande présentée par celui-ci dans les trois ans suivant la déclaration de culpabilité, les renseignements relatifs à ses activités jugés justifiés en l'occurrence;

k) indemniser le ministre, en tout ou en partie, des frais exposés par celui-ci pour la réparation ou la prévention du dommage à l'environnement résultant des faits qui ont mené à la déclaration de culpabilité;

l) exécuter des travaux d'intérêt collectif à des conditions raisonnables;

m) affecter, sous réserve du Code criminel ou des règlements d'application de l'article 278, toute amende ou autre sanction pécuniaire compte tenu des ordonnances rendues sur le fondement du dommage ou risque de dommage que cause l'infraction;

n) verser, selon les modalités prescrites, une somme d'argent destinée à permettre des recherches sur l'utilisation et l'élimination écologiques de la substance qui a donné lieu à l'infraction ou des recherches sur les modalités de l'exercice de la surveillance continue des effets de la substance sur l'environnement;

o) verser, selon les modalités prescrites, une somme d'argent à des groupes concernés notamment par la protection de l'environnement ou de la santé, pour les aider dans le travail qu'ils accomplissent au sein de la collectivité où l'infraction a été commise;

p) verser à un établissement d'enseignement, selon les modalités prescrites, une somme d'argent destinée à créer des bourses d'études attribuées à quiconque suit un programme d'études dans un domaine lié à l'environnement;

q) se conformer aux autres conditions jugées justifiées pour assurer sa bonne conduite et empêcher toute récidive. [Le souligné est de moi.]

(q) requiring the offender to comply with any other reasonable conditions that the court considers appropriate and just in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences. [underlining added]

[88] Relevant are paragraphs 291(1)(*a*), 291(1)(*b*) and 291(1)(*f*). Paragraph 291(1)(*a*) allows a court to prohibit any act that may result in "the continuation" of the offence, paragraph 291(1)(*b*) allows the court to order that an offender take any action considered by the court appropriate to remedy any harm to the environment resulting from the offence and paragraph 291(1)(*f*) allows the court to direct an offender to have an environmental audit conducted as prescribed by the court and to further direct the offender to remedy any deficiencies revealed during the audit.

[89] The respondents argue that a review of the legislative scheme contained in the Act reveals that where Parliament intends the Act to be directed to continuing offences it uses express language in that regard. Thus, paragraph 22(3)(*c*) of the Act authorizes a court to require a defendant to an action to do anything to "prevent the continuation of an offence", subsection 235(1) enables an EPCO to be issued where there are grounds to believe the Act or its Regulations have been breached "by a person who is continuing the commission of the offence" and paragraph 291(1)(*a*) allows a court to prohibit an offender from doing any act that may "result in the continuation [...] of the offence". The absence of explicit reference in the English version of section 311 of the Act to prevention of the "continuation of an offence" is said to reflect Parliament's intent that section 311 not apply in that circumstance.

[90] The respondents also argue, inferentially, that orders issued pursuant to sections 22 and 291 ordering a defendant to do anything that may prevent the continuation of an offence or refrain from any activity that may result in the continuation of an offence are issued following judicial determination that an offence under the Act has occurred. As noted above, on a proceeding under subsection 311(1) of the Act it is not necessary for the Minister to prove that an offence has occurred, but only that it appears that a person has done, is about to do, or is likely to do an act or thing constituting or directed toward the commission of an offence under the Act. The respondents argue, and I accept, that it is to some degree anomalous for the same relief to be available pursuant to subsection 311(1) when it "appears" that an offence has occurred or may occur as is available after conviction of an offence under section 291 of the Act. However, an EPCO may issue ordering someone to refrain from contravening the Act or to comply with the Act simply where an enforcement officer has reasonable grounds to believe that the Act or its Regulations have been contravened. While an EPCO is of limited duration, an EPCO may nonetheless direct a person to comply with the Regulations and an enforcement officer may cause the measure to be taken. This reflects a legislative intent that sweeping remedial measures may be ordered on less than proof that an offence has occurred.

[91] The anomaly asserted by the respondents does result in the situation that the procedural safeguards which would be available on a prosecution for an offence under the Act can be avoided where the Minister elects to bring proceedings for injunctive relief under subsection 311(1) of the Act. The safeguards available to a person prosecuted for an offence include the right to full and proper disclosure from the Crown, the presumption of innocence and the right to be proven guilty beyond a reasonable doubt. Proceedings under subsection 311(1) of the Act, commenced in this Court by application, carry with them no right to discovery of the Crown, no presumption of innocence and, I have found, a civil standard of proof.

[92] This anomaly and the potential for abuse would be avoided by interpreting section 311 to be prospective and pro-active in nature, operating to maintain the status quo by restraining future acts or directing future acts so as to prevent the commission of an offence, other than one that has occurred and is ongoing. Under this interpretation section 311 would not be available to prevent an offence which has already been committed whether or not it is a continuing offence. In that circumstance, the issuance of an EPCO or the commencement of a prosecution would be appropriate enforcement options.

[93] Such an interpretation would not, the respondents argue, be inconsistent with the objects and intent of the Act.

[94] The objects of the Act may be taken from the preamble to the Act. There, Parliament expressed the commitment of the federal government to, among other things, "pollution prevention as a national goal" and to "implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". Those principles are said to be consistent with interpreting subsection 311(1) as applying to the prevention of offences and not to the remediation of already existing situations. The contrary interpretation is not necessary in order for there to be effective remedial tools. The provisions of the Act with respect to environmental protection actions, EPCOs and the scope of an order that may be made on conviction for an offence would provide full enforcement options and remedies.

(c) Conclusion with respect to the scope of subsection 311(1) of the Act

[95] The use of inconsistent language in the Act makes it, in my respectful view, more difficult to attribute meaning to section 311 in the case of an existing and continuing situation. The failure to consistently and expressly refer to the prevention of the continuation of an offence and the use of language in section 276 which differs from that found in section 78.1 of the *Fisheries Act* do provide a basis for the interpretation urged by the respondents.

[96] I am concerned at the potential to use section 311 as an alternate to a prosecution under section 291 and so deprive a respondent of his or her rights to disclosure of the Crown's case, the presumption of innocence, and to proof of the Crown's case beyond a reasonable doubt.

[97] However ultimately, in light of my assessment of the evidence, it is not necessary to reach a final conclusion as to whether a mandatory injunction may issue to prevent the ongoing continuation of an offence where what is sought is the remediation of an already existing, static situation. The language used in paragraph 311(1)(*b*), when read in conjunction with section 276, is capable of supporting the interpretation that each day the offence continues is a new offence that may be prevented by the issuance of a mandatory injunction. My analysis will proceed on this basis.

(ii) Is some or all of the ASR PCB Material?

[98] I now turn to review the evidence before the Court and to state my findings with respect to that evidence.

[99] The evidence before the Court is contained in the affidavits filed by the applicant and the respondents, together with the cross-examination of some, but not all, of the deponents. Pursuant to an order of the Court, all cross-examinations were conducted *viva voce* before me at the hearing of the application.

(a) The evidence in support of the application.

[100] Environment Canada relies upon the affidavits of Mervin Fingas and Shannon Kurbis. Both were cross-examined.

1. <u>Affidavit of Mervin Fingas</u>

[101] Dr. Fingas is a scientist and the Chief of the Environmental Emergencies Science Division of Environment Canada. He holds a doctorate degree in Environmental Sciences as well as an M.B.A. in general business and managerial sciences and a Master of Science degree in Chemistry. Since 1974 he has worked with Environment Canada as a scientist in spill technology. As such he has experience and training in the sampling, analysis and impact of environmental pollutants, including PCBs. He was the author of the 1999 Environment Canada Report.

[102] Dr. Fingas designed and implemented Environment Canada's sampling and analysis program at the General Scrap and XPotential sites. After researching the scientific literature related to ASR sampling and analysis, and visiting an Ottawa area scrap shredding company, Dr. Fingas determined there were a number of specific and important considerations to be addressed in the sampling program. They were set out in his affidavit. Dr. Fingas concluded that samples from a sufficient number of locations within each ASR cell or pile would be required in order to achieve results that were statistically reliable and representative of each cell or pile.

[103] Once sampling locations were selected an excavating device was used to access the ASR at all depths and a number of 2 litre samples were taken. The actual sampling and the analysis of the sampled ASR were both carried out under his supervision.

[104] Dr. Fingas concluded that, at a minimum, the East and West ASR cells at the General Scrap site and storage cells 4 and 5 as well as the drying cell at the XPotential site have average PCB concentrations in excess of 50 ppm, and are therefore properly considered to be PCB Material. A more detailed statement of the results of his study is set out at paragraph 29 above. Dr. Fingas concluded that the ASR is fairly uniformly contaminated with PCBs and his conservative estimate was that there are 1,300 kg of PCBs in the ASR.

[105] In light of this, it was Dr. Fingas' opinion that the improper storage of PCB material poses a risk to human, plant and animal health and safety.

[106] With respect to the sampling program developed by Dillon in consultation with Jan Merks, Dr. Fingas disagrees that the methodology used by Dillon produced a more correct result. It is Dr. Fingas' opinion that the fact that the results produced using this methodology give rise to a lower standard deviation simply reflects that standard deviation can be expected to be lower in a process that mixes many samples before taking a sub-sample.

2. Affidavit of Shannon Kurbis

[107] Ms. Kurbis is an enforcement officer employed by Environment Canada. She detailed the chronology of events. Ms. Kurbis provided no independent scientific evidence with respect to the levels of PCB contamination, and relied upon the advice and opinion of Dr. Fingas with respect to the preparation of the sampling plan, and also with respect to the analysis, reporting and interpretation of the data collected by Environment Canada.

(b) The evidence in opposition to the application.

[108] The respondents rely upon the affidavits of Jacob Lazareck, David Clark, Jan Merks, Michael Bertram, Detlef Birkholz and Donald Davies. Only Messrs. Lazareck, Clark and Bertram were cross-examined on their affidavits.

1. Affidavit of Jacob Lazareck

[109] Mr. Lazareck is the president of XPotential and formerly was the vice-president of operations of General Scrap. Mr. Lazareck is a professional engineer who has been involved in the scrap recycling industry since 1970. He has been active in the Canadian Association of Recycling Industries, which is an association whose membership includes most scrap shredders, serving at one point as its first vice-president. Mr. Lazareck has also participated in the Institute for Scrap Recycling Industries, which represents scrap recycling industries in the United States.

[110] Mr. Lazareck described the business carried out by General Scrap and XPotential, described the sites on which each stored ASR, and detailed the chronology of events.

[111] With respect to steel recycling and ASR, to Mr. Lazareck's knowledge Environment Canada has never conducted inspections or sampling of ASR at other scrap shredding operations in Canada.

[112] Mr. Lazareck provided no specific evidence with respect to the levels of PCB contamination in the ASR at either the General Scrap or the Xpotential sites.

2. Affidavit of David Clark

[113] Mr. Clark is a professional engineer, and is the Regional Managing Partner of Dillon for the North/West region, and its senior environmental advisor. He holds a Bachelor of Science degree in engineering and a Master's degree in environmental engineering. He has over 20 years of experience in the fields of human health/environmental risk assessment; environmental impact investigations, and site assessments and remediation. Prior to entering private consulting with Dillon, Mr. Clark was the Director of the Land Protection Branch with the Saskatchewan Department of Environment. In that position, he was responsible for solid and hazardous waste management, chemical management, spill response and remediation programs. He served for 5 years as the Saskatchewan representative on the Canadian Council of Ministers of the Environment Waste Management Steering Committee. This committee was responsible for the development of protocols and codes of good practice for waste stream characterization, site decommissioning, PCB management, and the management of fuel storage and distribution systems.

[114] Dillon was retained to characterize the ASR contained in the East and West Piles at the General Scrap site and in cells 4 and 5 as well as the drying cell at the XPotential site. This required Dillon to design a sampling program, collect samples, provide the samples to Enviro-Test Laboratories for analysis and report and interpret the sampling and analysis results. Jan Merks was engaged as an expert consultant in the design of the sampling program and in the interpretation of the sampling and analysis data.

[115] Mr. Clark concluded that the ASR currently stored at the 5 piles/cells in question do not contain mean concentration of PCBs above the regulatory threshold of 50 ppm.

[116] Dillon initially took three sets of ASR samples from cell 5 at the XPotential site in order to test the precision of three protocols for field sampling and sample preparation. The three protocols tested were:

(i) the protocol used by Environment Canada;

(ii) discrete sampling using mechanically sample splitting; and

(iii) a mechanically split then interleaved protocol prescribed by Mr. Merks.

[117] The Environment Canada sampling protocol was found to have the highest variance and therefore, in Mr. Clark's opinion, was the least appropriate sampling plan. In his further opinion, the conclusions in the Dillon Report ought to be accepted over the conclusions in the 1999 Environment Canada Report for reasons including:

(i) Dillon's field sampling and sample preparation generated representative samples of ASR material in a random and totally objective fashion while Environment Canada's field sampling and sample preparation was subjective; and

(ii) Dillon's sampling plan (which employed stratified systematic sampling) is preferable to Environment Canada's sampling plan (which employed stratified random sampling) for the purpose of characterizing highly heterogeneous waste material such as ASR.

3. Affidavit of Jan Merks

[118] Mr. Merks is a metrologist with extensive experience in the design and evaluation of sampling plans and in the statistical analysis of data in relation to a wide range of the industries and circumstances. He has been accepted as qualified to give expert testimony on the subjects of statistical analysis and sampling design in a number of court and administrative proceedings. He has written a text on the sampling and analysis of bulk solids. He has participated in the activities of a number of Canadian advisory committees to the international standards organization in relation to the sampling of bulk materials and the application of statistical methods. He has experience as an analytical chemist, a chief chemist and a laboratory manager.

[119] Mr. Merks was initially engaged for the purposes of providing advice to Dillon on the design of sampling and sampling preparation procedures to be used by Dillon in the determination of the concentration of PCBs in the piles and cells as issue in this proceeding. Mr. Merks was also retained for the purposes of reviewing and commenting upon the sampling methodology and statistical methods employed by Environment Canada as described in the Fingas and Kurbis affidavits and he reviewed the results of the sampling and analysis of the ASR undertaken by Dillon.

[120] It is Mr. Merks' opinion that statistical analysis of the data contained in the 1997 Environment Canada Report and in the 1999 Environment Canada Report does not provide proof that any cell or pile of ASR has a mean PCB concentration that statistically differs from the regulatory threshold of 50 ppm. Conversely, he opines that the statistical analysis of Dillon's results establish that the mean PCB concentrations of each pile or cell tested by Dillon are either significantly less than or statistically identical to the regulatory threshold.

[121] It is Mr. Merks' opinion that the sampling program implemented by Dillon is to be preferred over the sampling program employed by Environment Canada for the following reasons:

1. Dillon applied stratified systematic sampling which is the methodology that is most appropriate when sampling materials such as the ASR stored at the General Scrap and XPotential sites. The stratified random sampling used by Environment Canada is a methodology more appropriately used for applications such as the statistical quality control of consumer products.

2. The stratified systematic sampling protocol applied by Dillon allows for a more rigorous statistical analysis of the analytical data generated from the sampling program.

3. Dillon carefully homogenized its primary samples in order to minimize the variance of the selection stage. In contrast, Environment Canada homogenized its samples in a haphazard manner.

4. Dillon's procedure not only reduces the variance of the sample preparation stage but also gives an unbiased estimate for the measurement variance.

[122] Mr. Merks compared the test programs employed by Dillon and Environment Canada and his comparison showed that:

1. Dillon's sampling procedure is proven to be significantly more precise than that applied by Environment Canada.

2. A statistical comparison of the variances between and within the piles or cells for each of the Dillon Report, the 1997 Environment Canada Report and the 1999 Environment Canada Report proves that Dillon's variances are homogeneous, but the Environment Canada's variances are not.

3. All of these inferences establish that Dillon's sampling program is significantly more precise than Environment Canada's.

[123] While the 1999 Environment Canada Report states that Environment Canada applied procedures that were analogous to those recommended by the United States Environmental Protection Agency ("EPA"), in Mr. Merks' opinion Environment Canada implemented procedures that were fundamentally dissimilar to those recommended by the EPA. Environment Canada's departures from suggested EPA procedures were:

1. Environment Canada failed to apply stratified systematic sampling.

2. Environment Canada failed to apply, or improperly applied, the formula for determining the minimum number of samples required from each sampling unit suggested by the EPA in order to be able to draw statistically valid conclusions about PCB concentrations.

3. Environment Canada failed to correctly calculate 95% confidence limits for the arithmetic mean concentration of PCBs.

4. Environment Canada failed to apply the recommended EPA criteria that would have proved the test program used to produce the 1999 Environment Canada Report to be inconclusive.

[124] Mr. Merks observes that the results of the 1997 Environment Canada Report should have given Environment Canada an indication of the extreme variability in its data.

[125] Apart from these concerns, in Mr. Merks' view Environment Canada's conclusions are entirely invalidated as a result of Environment Canada's grossly erroneous "total error calculation". He views the principal deficiencies in Environment Canada's methods to be:

1. Environment Canada erroneously used the certified value of the standard reference materials as its true PCB concentration.

2. Environment Canada's attempt to use the analysis of the standard reference material as a calibration procedure was incorrect.

3. Environment Canada erroneously applied a correction for percentage variances in violation of the fundamental properties of variances as defined in probability theory and applied statistics.

4. Affidavit of Michael Bertram

[126] Mr. Bertram is a professional geoenvironmental engineer who was employed by Dillon at the material time. He has 9 years experience in environmental site assessment and remediation and contaminant characterization. He was present when samples were collected and he supervised the sample collection.

[127] Mr. Bertram states that the sampling protocols as described in the 1999 Environment Canada Report differed from those employed by Dillon in 4 respects:

1. Environment Canada, in collecting primary samples with a back-hoe, scraped the side of each test pit from top to bottom and mixed the scraped ASR in the bottom of the test pit with the back-hoe. The bucket of the back-hoe was then used to bring up the primary sample. In comparison, the procedure used by Dillon in all but 10 of the 127 test pits was to start the back-hoe bucket at the bottom of the test pit and to scrape the ASR into the bucket from the bottom of the test pit up along the wall of the test pit to the top to collect approximately 20 litres of ASR in the bucket.

2. Environment Canada selected sub-samples by using a hand-held scoop to manually fill a 2 litre sample jar from the material in the back-hoe bucket. Dillon used a riffle splitter to randomly select sub-samples from each of the 20 litre primary samples to be placed into a 2 litre sample jar. The use of the riffle splitter substantially eliminated the potential for subjectivity and human bias in the sample selection process.

3. Environment Canada collected up to 8 samples at each pile or cell. Dillon collected between 20 and 42 primary samples at each pile or cell.

4. Environment Canada submitted discrete samples from each test pit for laboratory analysis. Dillon interleaved samples from even and odd numbered test pits for each sample section to generate a representative composite sample which was then submitted for laboratory analysis.

[128] It is Mr. Bertram's opinion that the Environment Canada procedure of scraping down the test pit is a less reliable sampling method because finer material will accumulate at the bottom of the test pit from digging the test pit. Fine materials may contain PCB concentrations materially different from PCB concentrations in coarse materials. Further, because the test pit's width was usually the same as the width of the back-hoe bucket, adequate mixing would be improbable.

[129] In Mr. Bertram's opinion Environment Canada's methodology of collecting its 2 litre samples by using a metal scoop would result in a non-representative volume of fine materials which would bias the samples in favour of fine materials. The samples would not therefore be representative of the ASR in each sampling unit. In addition, Mr. Bertram observes that manually sampling using a scoop unavoidably introduces human bias in selecting what material is to be placed in the sample jars.

5. Affidavit of Detlef Birkholz

[130] Dr. Birkholz is the Executive Vice-President of Enviro-Test Laboratories. He holds a PhD in environmental toxicology and has 28 years practical experience in analytical chemistry and 13 years research and practical experience in environmental toxicology. He has been qualified as an expert witness on the subject of analytical chemistry, laboratory procedure and environmental testing in numerous court proceedings.

[131] Enviro-Test Laboratories was retained to provide analytical services in respect of the sampling and analysis program undertaken by Dillon with respect to ASR samples collected from the General Scrap and XPotential sites. Dr. Birkholz reviewed the Enviro-Test analytical data for the quantification of PCB concentrations in the samples of ASR collected by Dillon and also reviewed the related quality assurance/quality control data. Upon his review of the data and quality control results it is Dr. Birkholz' opinion that the analytical results provided by Enviro-Test to Dillon are sound, reliable and accurate.

6. Affidavit of Donald Davies

[132] Dr. Davies is the Vice-President, Scientific Programs with Cantox Environmental Inc. He holds a doctorate degree in nutrition and toxicology and has extensive experience in the preparation of health risk assessments in respect of a variety of industrial sites and in relation to a variety of substances. He has in the past appeared and been qualified as an expert witness on the subject of toxicology and health risk assessment in numerous court proceedings and in quasi-judicial hearings. He is certified by the American Board of Toxicology. On December 15, 2000, he attended at the General Scrap site and the XPotential site for the purpose of preparing a preliminary health and environmental risk assessment. It is his opinion that the PCBs contained in the ASR stored on the General Scrap and XPotential properties do not constitute a risk to the environment, the general public, employees and visitors at the sites, or to wildlife in the area. This opinion holds regardless of whether the level of PCB concentrations measured in the stored ASR is as reported by Dillon or by Environment Canada. This is, in his opinion, because the reported differences in the concentrations are of no significance from a health or environmental hazard perspective.

(c) Analysis of the Evidence

[133] In oral argument counsel for the applicant observed that having read the materials filed by the parties it appears that there are two different cases before the Court, reflecting two completely different views on a common set of facts. This is very much the case.

[134] In order for the applicant to succeed in this application Environment Canada must establish, on a balance of probabilities, that it appears that the ASR contains PCB material in a sufficient quantity that the Regulations require it to be labelled and stored in a particular fashion.

[135] The analysis of the evidence logically begins with what is not in dispute. That is:

1. For the Regulations to apply the ASR must be "PCB Material". This requires that the ASR be a PCB solid or PCB substance, as those terms are defined in the Regulations. This in turn requires that the ASR contain more than 50 mg of PCBs per kilogram (or more than 50 ppm), and there must be 100 kg or more of the PCB solid or substance.

2. Neither the Act nor the Regulations prescribe any particular sampling strategy or methodology.

3. In the present context a sampling strategy is the process which determines how many individual samples will be taken from each ASR cell or pile, and the locations at which they will be taken. Based on the analysis of those samples, inferences can be drawn about the ASR cell or pile as a whole, or about the other non-sampled portions of the ASR cell or pile. What is at issue is what is contained in the ASR which has not been analyzed.

4. Environment Canada does not take issue with the individual analytical results which were obtained as a result of the respondents' sampling program, as reported by Dillon. Environment Canada takes issue with the respondents' interpretation and analysis of those results.

5. The respondents take issue with the individual analytical results obtained by Environment Canada and with the analysis and interpretation of those results by Environment Canada.

6. The central dispute between the parties is whether the average of an entire cell or pile, or smaller individual areas within the pile or cell referred to as hot spots should be used to determine whether there is 100 kg of ASR with a PCB concentration above 50 ppm.

[136] In light of the submissions advanced by the parties, the evidence before the Court will be considered under the following headings:

1. The validity of the Environment Canada Data.

2. The use of individual results.

3. The use of statistics.

1. The Validity of the Environment Canada Data

[137] The respondents assert that the data contained in the 1997 Environment Canada Report and in the 1999 Environment Canada Report ought to be rejected, or that the data contained in the Dillon Report ought to be preferred, for the following reasons:

1. The Environment Canada reports are based upon an insufficient number of samples and an inappropriate sampling system.

2. Environment Canada departed from its own sampling plan, at least with respect to the West Pile at General Scrap.

3. Environment Canada used an inferior method of sample selection.

[138] Each assertion will be considered in turn.

Is the 1999 Environment Canada Report based upon an insufficient number of samples and an inappropriate sampling system?

[139] Dr. Fingas swore in his affidavit and confirmed in cross-examination that he was required to "design and implement a sampling methodology using standard and proven procedures that would allow the sampling team to select samples from each of the large piles ("cells") of ASR at General Scrap and XPotential which, when analysed, would provide results that would be representative of each entire cell". Dr. Fingas determined that "samples from sufficient locations within each cell of ASR would be required to achieve results that were statistically reliable and representative of [...] each cell".

[140] With respect to the number of samples, Dr. Fingas' report stated that he applied a statistical formula in order to calculate the minimum number of samples, and Dr. Fingas referenced two EPA studies in support of this approach: "Sampling Guidance for Scrap Metal Shredders: Field Manual, Environmental Protection Agency, 1992" ("1992 EPA Report") and "Test Methods for Evaluating Solid Waste, Chapter 9, Sampling Plan, Environmental Protection Agency, 1993" ("1993 EPA Report"). Both of these documents were cited as references in Dr. Fingas' report, and he confirmed on cross-examination that he listed as references whatever reports he used "very heavily" in the preparation of his report. Of the two documents, Dr. Fingas stated that he relied more upon the 1992 EPA Report as a result of advice received from the EPA.

[141] As to the sampling system, at each site the pile or cell at issue was divided into units of 3 metre "cells". Using a random number selection process certain cells were selected for sampling and analysis. This was said to be a procedure analogous to that recommended by the Environmental Protection Agency 1992 and 1993 Reports.

[142] Jan Merks, in his affidavit, swore with respect to the number of samples taken that Environment Canada failed to apply or inappropriately applied the formula recommended by the EPA for determining the minimum number of samples required by each pile or cell.

[143] With respect to the sampling program, Mr. Merks swore that the sampling program implemented by Dillon is to be preferred over the Environment Canada sampling program because Dillon applied stratified systematic sampling which is a methodology most appropriate when sampling materials in bulk. In contrast, Environment Canada applied stratified random sampling which is a methodology more appropriate, in Mr. Merks' view, for applications such as the statistical quality control of consumer products. It was also Mr. Merks' view that the stratified systematic sampling protocol applied by Dillon is more precise for bulk materials and that the EPA suggested stratified systematic sampling.

[144] The Dillon Report also expressed the view that stratified systematic sampling is the most suitable protocol, although in substance Dillon looked to Mr. Merks to design the investigation and sample preparation protocols.

[145] Dr. Fingas was cross-examined on these issues. Mr. Merks was not. It was Dr. Fingas' evidence on cross-examination that in addition to relying upon the references cited in his report he met separately with representatives of the EPA who provided him with other reports. Dr. Fingas also testified that he sent his sampling plan to the EPA which probably provided verbal comments about the plan which he did not document. No testimony was given as to the nature of the comments provided.

[146] With respect to the number of samples taken, Dr. Fingas confirmed that the 1993 EPA Report on sampling guidance for scrap metal shredders recommended that 20 samples be taken from each pile and that he took far fewer samples than that. He testified that "[w]e follow largely the official sampling manual [the 1992 EPA Report] [...] which is at odds to this [1993 EPA] manual". The 1992 EPA Report does not deal directly with ASR. Rather, the 1992 EPA Report sets out a statistical equation to be used for calculating the appropriate number of samples to collect from solid waste. Dr. Fingas set out that equation in his report. Dr. Fingas then used the examples from the literature to calculate the minimum number of samples and then doubled the resultant answer in order to determine the number of samples to be taken.

[147] I am satisfied that the development of an appropriate sampling plan is of crucial importance in order to evaluate the PCB content of ASR. I reach that conclusion on the basis that the 1992 EPA Report, which Dr. Fingas relied heavily upon, states at page NINE-1:

The initial - and perhaps most critical - element in a program designed to evaluate the physical and chemical properties of a solid waste is the plan for sampling the waste. It is understandable that analytical studies, with their sophisticated instrumentation and high cost, are often perceived as the dominant element in a waste characterization program. Yet, despite that sophistication and high cost, analytical data generated by a scientifically defective sampling plan have limited utility, particularly in the case of regulatory proceedings. [underlining added]

[148] Dr. Fingas agreed on cross-examination that analytical data generated by a scientifically defective sampling plan has limited utility.

[149] To the extent that the evidence conflicts between that of Dr. Fingas and Mr. Merks with respect to the numbers of samples to be taken and the use of a stratified systematic sampling plan, I prefer the evidence of Mr. Merks. I prefer Mr. Merks' evidence because of his recognized expertise specifically with respect to the design and evaluation of sampling plans. In this connection he has been qualified as an expert witness on the subject of sampling design in numerous court and administrative proceedings and has written a text on the sampling and analysis of bulk solids. Mr. Clark testified that Mr. Merks' work with respect to waste characterization had been accepted by the British Columbia Ministry of Environment, Lands and Parks Branch.

[150] While Dr. Fingas has expertise in sampling matters, and has written about 10 peer reviewed publications that "deal with sampling, with PCBs with issues of that type" his curriculum vitae describes his specialties to include "spill dynamics and behaviour, spill treating agent studies, in-situ burning and the technology of personal protection equipment". I am not satisfied that Dr. Fingas' knowledge and experience with respect to the design and evaluation of sampling plans is as extensive as that of Mr. Merks. I place little reliance on whatever verbal information or comments Dr. Fingas received from the EPA with respect to his sampling plan. This was input not cited in his report or affidavit, and apparently was not of sufficient importance to warrant being noted or recorded on Dr. Fingas' file. The specifics of any input he received were not put in evidence.

[151] Moreover, the applicant did not cross-examine Mr. Merks upon his evidence that Environment Canada erred in calculating the minimum number of samples required and that the sampling program implemented by Dillon is to be preferred over the sampling plan implemented by Environment Canada. Nor was Mr. Merks cross-examined upon his evidence that Environment Canada did not use procedures analogous to those recommended by the EPA, but rather implemented procedures that were fundamentally dissimilar to those recommended by the EPA with respect to stratified systematic sampling. Mr. Merks' testimony on these matters is, therefore, unimpeached.

Did Environment Canada depart from its own sampling plan with respect to the West Pile at General Scrap?

[152] The applicant concedes that the Environment Canada sampling plan was departed from with respect to the West Pile in that only surface samples were taken with a shovel from a small portion of the West Pile. The sampling plan contemplated using a back-hoe to take samples at randomly selected locations. Generally each hole sampled was of a depth varying from 2 to 5 metres so that each sample would be, in Dr. Fingas' words, "representative of a slice through that entire pile". By taking 5 slices through 5 different locations in a pile Dr. Fingas believed this "characterizes whether or not there is PCB material".

[153] The departure from the sampling plan resulted from the fact that at the time Environment Canada took its samples, scrap metal had been placed on top of the pile making parts of it inaccessible.

[154] The consequence of this departure would be to reduce the extent to which the "slices" taken from the West Pile were representative of the pile at that location. This is because only the surface of the slice was sampled. This would provide a basis for discounting the extent to which Environment Canada's test results properly represent the West Pile.

Did Environment Canada use an Inferior Method of Sample Selection?

[155] To obtain its primary increments Environment Canada used a back-hoe to dig a hole through the ASR. Having exposed a vertical sidewall of the cell, the back-hoe scraped material down the side of the hole to the bottom of the hole where the scrapings were then mixed. The back-hoe operator then removed a bucket of material from the bottom of the hole. Workers inspected the bucket load and if pieces too big to fit into the sampling jar were found they were cut with snips. The sampling crew then mixed the back-hoe bucket sample with a shovel, and then selected random samples with a hand scoop and placed them in 2 litre sample bottles.

[156] The respondents, on the other hand, dug with a back-hoe a hole through the ASR to expose the cell. The back-hoe then scraped the side of the hole upward from the bottom of the hole. The material contained in the back-hoe bucket was then inspected and large pieces were cut. Next, the material in the back-hoe bucket was mixed with a fork or shovel and then passed through a machine called a riffle splitter. The riffle splitter passed the sample material through it, randomly splitting the sample into two piles. Sample material was passed through the riffle splitter and spewed out at two ends of the splitter, designated as being odd and even. A random number generator was used to generate a list of random numbers. ASR was placed in the riffle splitter and, depending upon the next available random number, the even or odd pile was placed into the sample container. The non-chosen split pile was collected and then put through the splitter again. The process continued until the required 20 litre sample, the primary increment, was collected. The riffle splitter was used to maximize the degree of homogeneity of the sample.

[157] As explained in Mr. Clark's affidavit, Dillon did a test in cell 5 in which the Environment Canada sample selection method was followed whereby samples were manually taken from the back-hoe bucket in the manner done by Environment Canada. The one difference with this test is that the back-hoe bucket had been filled by scraping up, not down, the side of the selected cell. The samples were analyzed and compared with the analysis of samples which had been taken and then mechanically split with the riffle splitter. The results of the test were as follows:

PCB ppm (mean)	Standard Deviation
Mechanically Split Sample	50.4	18.6
Environment Canada method	68.3	59.4

[158] In considering these respective methods, the parties agree that the purpose of mixing the ASR in the pit (by Environment Canada) in the back-hoe bucket, and with the riffle splitter (by the respondents) was to homogenize the ASR at the sampling location. The parties further agree that it is important that the primary increment be homogenized to the greatest extent possible.

[159] Dr. Fingas swore that PCBs primarily reside in the oils within ASR and are concentrated in the fine granular ASR material and within the permeable upholstery material component of ASR. It follows, in Dr. Fingas' view, that subsampling which selects larger or more dense components of ASR lowers the apparent PCB content and taking only the finer components raises it.

[160] It was the evidence of Mr. Merks that the riffle splitter carefully homogenized the primary samples while Environment Canada homogenized its samples in a haphazard manner. It was Mr. Clark's opinion that Environment Canada's field sampling was subjective while Dillon's was random and objective. Mr. Bertram, the professional engineer who supervised the sample selection, was of the opinion that:

1. Fine material would accumulate at the bottom of the test pit as a result of digging the pit. As well, the test pit width would usually be the same width as the back-hoe bucket making adequate mixing improbable. For these reasons, he concluded that Environment Canada's sampling procedure was less reliable.

2. Environment Canada's manual scooping of ASR samples into the sample jar would result in a non-representative volume of fine materials so that the samples would not be representative of the ASR in each sampling container.

[161] Mr. Merks was not cross-examined on his opinion. Both Mr. Clark and Mr. Bertram were cross-examined, but I do not find their evidence to have been impugned on these issues.

[162] Environment Canada argues that there is no analytical evidence that scooping down or up the pit is preferable, and no analytical evidence that the riffle splitter is preferable. That is correct, because the Dillon test of the Environment Canada method, which produced higher levels of PCB contamination, was based on a primary sample obtained by scraping up the side of the pit.

[163] However, the 1992 EPA Report, which Dr. Fingas endorsed and followed, notes at page NINE-8 that:

It is important to emphasize that a haphazardly selected sample is not a suitable substitute for a randomly selected sample. That is because there is no assurance that a person performing undisciplined sampling will not consciously or subconsciously favor the selection of certain units of the population, thus causing the sample to be unrepresentative of the population.

[164] Dr. Fingas agreed that PCBs are concentrated in the fine granular ASR material. Mr. Bertram's evidence, which I accept, is that Environment Canada's sampling method results in finer material accumulating at the bottom of the test pit, and that manual scooping of the ASR samples results in a non-representative volume of fine materials.

[165] Taken together I am left with real concern that the Environment Canada method will result in higher levels of PCBs being reported, as was observed by the Dillon tests results set out above.

[166] I place more reliance, therefore, on Dillon's method of sample selection.

[167] One further issue may be considered under this heading and that is the propriety of the respondents' method of selecting analytical samples using the Merks' riffle split and the interleaving protocol. In order to submit a representative sample of collected ASR for laboratory analysis, 2 litre samples were prepared from the primary 20 litre samples by riffle splitting and interleaving composite samples.

[168] It is Mr. Merks' opinion that compositing sets of primary increments into pairs of interleaved primary samples and preparing primary samples with the riffle splitter not only reduces the variance of the sample preparation stage, but also gives an unbiased estimate for the measurement variance.

[169] Dr. Fingas disagrees and in his affidavit he swore that it is incorrect to conclude that the Dillon results are more correct on the basis that the standard deviation is lower. In Dr. Fingas' view the standard deviation can be expected to be lower in a process that mixes many samples before taking a sub-sample. Mixing the material reduces the variability and the standard deviation.

[170] Environment Canada submits that the method used by Dillon serves to hide the true character of the material contained in a cell and that the only explanation for using the Merks interleaving riffle split protocol is because it artificially produces the lowest possible result.

[171] Returning to the tests conducted by Dillon, referred to above, Dillon reported a mean PCB value of 50.4 ppm with a standard deviation of 18.6 for the mechanically split sample. When testing the mechanically split and interleaved samples a mean PCB value of 39.6 ppm was reported with a standard deviation of 10.8. This difference is significant.

[172] In choosing whether to prefer the opinion of Dr. Fingas over that of Mr. Merks, I am left with the difficulty that it was Mr. Merks who prescribed the interleaving protocol (see: paragraph 23(*c*)(ii) of Mr. Clark's affidavit) but the applicant chose not to cross-examine Mr. Merks on this, or any part of his opinion.

[173] What is also relevant, in my view, are the comments found in the 1992 EPA Report about composite sampling. The 1992 EPA Report was the report which Dr. Fingas relied upon in preference to the 1993 EPA Report on the basis of verbal advice he received from the EPA.

[174] At page NINE-21 the following appears in the 1992 EPA Report:

In composite sampling, a number of random samples are initially collected from a waste and combined into a single sample, which is then analyzed for the chemical contaminants of concern. The major disadvantage of composite sampling, as compared with noncomposite sampling, is that information concerning the chemical contaminants is lost, i.e., each initial set of samples generates only a single estimate of the concentration of each contaminant. Consequently, because the number of analytical measurements (n) is small, s_x and $t_{.20}$ are large, thus decreasing the likelihood that a contaminant will be judged to occur in the

waste at a nonhazardous level (refer to appropriate equations in Table 9-1 and to Table 9-2). A remedy to that situation is to collect and analyze a relatively large number of composite samples, thereby offsetting the savings in analytical costs that are often associated with composite sampling, but achieving better representation of the waste than would occur with noncomposite sampling.

The appropriate number of composite samples to be collected from a solid waste is estimated by use of Equation 8 (Table 9-1), as previously described for the three basic sampling strategies. In comparison with noncomposite sampling, composite sampling may have the effect of minimizing between-sample variation (the same phenomenon that occurs when the physical size of a sample is maximized), thereby reducing somewhat the number of samples that must be collected from the waste. [underlining added]

The reference in the above quotation to s_x is to standard error. The reference to $t_{.20}$ is to tabulate values set out in Table 9-2 of the EPA Report.

[175] No evidence was lead that Dillon did not collect and analyze a sufficiently large number of composite samples.

[176] In the result, on the basis of the reference to composite sampling in the 1992 EPA Report in the context of achieving better representation of the waste, and on the basis of the failure to cross-examine Mr. Merks, I prefer the evidence of Mr. Merks that compositing samples through interleaving was an appropriate procedure. Environment Canada has failed to satisfy me on the evidence that the interleaving protocol was used because it artificially produces the lowest possible results.

[177] To summarize my conclusions with respect to the validity of the Environment Canada data, I conclude that:

1. The sampling plan implemented by Dillon is preferable to that implemented by Environment Canada because of Dillon's use of stratified systematic sampling and because of the greater number of samples it took.

2. Environment Canada departed from its sampling plan with respect to the West Pile.

3. Dillon's method of sample selection was superior in that samples were carefully homogenized with the riffle splitter and were randomly and objectively selected.

4. It was appropriate to composite samples for analysis.

[178] I turn now to consider the use which can be made of the individual test results, particularly those obtained by Dillon.

2. The Individual Test Results

[179] As noted above, it was Dr. Fingas' task to scientifically determine whether the ASR at the General Scrap and XPotential sites was PCB material. In order to do so he was required, in his words, to design and implement a sampling methodology "that would allow the sampling team to select samples from each of the large piles ("cells") of ASR at General Scrap and XPotential which, when analysed, would provide results that would be representative of each entire cell" [underlining added]. Dr. Fingas' work resulted in a report that expressed the PCB content on the basis of an average for each pile, with upper and lower probability limits expressed.

[180] On cross-examination, in addition to confirming that he took a sufficient number of samples, in his view, to be representative of the whole piles Dr. Fingas stated that:

i) the individual hole results were important;

ii) his first objective was to characterize the PCB content of the material in the sites;

iii) because of the size of each hole, on the basis of the result of one hole alone they could conclude under the Act that there was PCB material in that hole;

iv) he believes that individual sample results, in addition to stating what is in the 2 litre sample bottle, are representative of what is in the hole in the ground from which the sample was taken.

[181] Environment Canada now argues that the individual results of all of the samples are determinative of the application. Asserting that "[t]here can be absolutely no dispute that the analytical results tell us what was in each two litre sample before PCB extraction", Environment Canada argues that the results from each 2 litre sample must represent a larger area. At a minimum the samples are said to represent the ASR in the 20 litre primary increment. Taking each primary increment to weigh 6 kg, Environment Canada then calculates the weight of all primary increments from which samples returned values of more

than 50 ppm in order to establish that there is more than 100 kg of PCB material. Environment Canada through this exercise calculates there to be 396 kg of PCB material.

[182] Environment Canada further argues, however, that the most reasonable inference is that each 20 litre primary increment represents the entire mass of the material excavated from the sample hole. Calculating what is said to be the weight of the material removed from the test pits from which samples returned values over 50 ppm, Environment Canada calculates that there is over 73,080 kg of PCB material. None of these calculations were contained in Dr. Fingas' report, nor did he testify as to those calculations.

[183] The respondents reject this argument and state that individual sample results cannot be used by themselves to draw conclusions about the characteristics of a given volume of ASR.

[184] In support of this submission, the respondents rely upon the testimony of Mr. Bertram and Mr. Clark.

[185] On cross-examination Mr. Bertram testified as follows:

2816. Q Would you agree then that viewing the sampling results on an individual test pit basis that to the extent that individual test pits showed returns over 50 parts per million, that you can infer from that that you are identifying areas of hotspots or higher concentrations?

A I can't view this as an individual test pit. These are samples taken from one media. They are taken from different locations. They are taken with very heterogeneous material that is representative of the whole cell, as we have been calling it. To say that one test pit is higher than another is common sense. We could have done one test pit one foot away from another test pit and got different results. There is going to be variability in such material. I can't view this as a single sample or a single entity per - - this is a collection of a whole.

[...]

BY MR. KATZ:

2817. Q Would you agree with me, sir, that it is possible to utilize these test results or fresh rather test results if they were taken, utilize them to zero in on areas of high concentration and then step out from those areas to determine the extent of those areas of high concentration?

A No, you could not.

2818. Q You could not?

A You could not, unless you went to a particle by particle basis you could not, and even at that point, since there is not a homogenous mixture of those individual particles that you are analyzing, you cannot determine a plume from one, from one source point. [underlining added]

[186] It was Mr. Clark's evidence that:

i) The individual test results did not show anything about the quantity of PCB material in total in piles or cells and that there was a danger in over-interpreting a singular laboratory result.

ii) One cannot on the basis of the PCB extraction protocol assume that PCBs are uniformly distributed within each 2 litre sample. The PCBs could be contained in a very small portion of the 2 litre sample.

iii) Different samples taken from the same primary samples will not provide the same analytical results. Rather, it will be a population of data with a distribution of its own. This highlights sampling error. Sampling error is a statistical term which reflects the natural variation that exists from one sample to another. It arises due to the fact that not all of the material in the primary sample is analyzed and thus there is variability in the results from one sample to another.

iv) With respect to cell 5, Dillon caused different samples from the same primary increment to be taken and analyzed. Samples were analysed in January and November of 2000 and the results differed. This showed the inherent variability within the primary samples, which variability arises through sample development. The results of the analysis of different samples from the same primary increment were:

Composite Sample	Total PCBs ppm	Total PCBs ppm

Identifier	January 2000 Lab Report	November 2000 Lab Report
N21 ODD	61	48
N21 EVEN	56	30
N22 ODD	37	38
N22 EVEN	45	50
N23 ODD	45	56
N23 EVEN	25	52
N24 ODD	28	51
N24 EVEN	35	43
N25 ODD	29	61
N25 EVEN	28	50
N26 ODD	40	82
N26 EVEN	49	70
N27 ODD	35	38
N27 EVEN	40	45

[187] To the extent that the evidence of Dr. Fingas with respect to the use which may be made of individual sample results conflicts with the evidence of Mr. Clark and Mr. Bertram, I prefer the evidence of Messrs. Clark and Bertram for the following reasons.

[188] First, I reject the premise of the applicant's argument that there can be absolutely no dispute that the analytical results tell us what is in each 2 litre sample. This is demonstrated to be untrue by the Dillon sampling results set out above where significantly different analytical results were obtained from analysis of different samples taken from the same primary sample. Dr. Fingas admitted on cross-examination that you can get different results from the same primary sample taken at different times.

[189] Indeed, one of the references Dr. Fingas relied upon and cited in his 1999 Report was the Westat Inc. PCB Lead and Cadmium Levels in Shredder Waste Materials study, which was an EPA pilot study done in 1991. Mr. Clark testified that in such study they observed and reported variability within their primary sample.

[190] Environment Canada did not test to see whether there was variability between one test result and another in the same location. If samples taken from the same primary sample can produce different analytical results, one result from a primary sample cannot logically be extended to apply to a larger area such as the material in a 20 litre back-hoe bucket, or the entire mass of a hole.

[191] Second, Dr. Fingas admitted that sampling and measurement errors are inherent when one samples ASR, and that because ASR is heterogeneous and because of sampling and analytical errors different results may be obtained between samples taken 2 feet apart. This would seem to make it very difficult to draw inferences from a single result.

[192] Finally, both parties acknowledged the expertise of the EPA and both the 1992 and 1993 EPA Reports contain relevant instruction on the point. The 1992 Report, which according to Dr. Fingas was more authoritative, states the following

at page NINE-30:

During the implementation of a waste sampling plan or a statistical experiment, an effort is made to minimize the possibility of drawing incorrect inferences by obtaining samples that are representative of a population. In fact, the term "representative sample" is commonly used to denote a sample that (1) has the properties and chemical composition of the population from which it was collected, and (2) has them in the same average proportions as are found in the population.

In regard to waste sampling, the term "representative sample" can be misleading unless one is dealing with a homogeneous waste from which one sample can represent the whole population. In most cases, it would be best to consider a "representative data base" generated by the collection and analysis of more than one sample that defines the average properties or composition of the waste. A "representative data base" is a more realistic term because the evaluation of most wastes requires numerous samples to determine the average properties or concentrations of parameters in a waste. (The additional samples needed to generate a representative data base can also be used to determine the variability of these properties or concentrations throughout the waste population.) [underlining added]

[193] The parties agree that ASR is not homogenous and the EPA 1992 Report is express that one sample can only represent the whole population if the waste is homogenous. In other cases, the EPA concludes that it is best to consider a representative data base. This underscores the danger in relying upon one sample to represent the contents of one sample hole or even one back-hoe bucket.

3. The Use of Statistical Analysis

[194] The nub of the dispute between the parties is characterized by Environment Canada as being whether the average of an entire cell or pile or of smaller individual areas within the pile or cell (known as hot spots) should be used to determine whether there is 100 kg of ASR with a PCB concentration of 50 ppm or more.

[195] Environment Canada takes the position that statistical inferences (the applicability of the mean, standard deviation and confidence intervals for entire cells and piles) are irrelevant to the issue of compliance with the Regulations.

[196] The respondents, however, take the position that the relevant question is whether there is PCB material. This is stated to be essentially "an exercise in hypothesis testing". In order to determine whether particular ASR is PCB material the respondents' experts developed a sampling and analytical program and determined that the appropriate approach in order to characterize the ASR was by identifying each entire pile and cell at issue as a sampling unit. This approach is said to be consistent with the 1992 EPA Report.

[197] Environment Canada relies upon the evidence of Dr. Fingas. He testified on cross-examination that:

i) If one looks at the literature, the distribution of the PCBs in the ASR is not in a normal or logged normal or other known distribution. It is a very random distribution. Therefore, one should not by any form of science use statistics on that type of data.

ii) It is well-known scientifically that it is inappropriate to apply statistical methods to non normal data.

iii) Notwithstanding the reference to statistical applications in the 1992 and 1993 EPA Reports in order to analyze sample data, those statistical applications could not be made to ASR.

iv) Dr. Fingas also took issue with the following statement from the 1993 EPA Report (the field manual to provide sampling guidance for scrap metal shredders):

Because of the sampling error and laboratory error, it is not possible to determine exactly the concentration of toxic substances. However, by using the methods in this section, you will be able to make statements such as, "As a result of our study, we are 95% certain that the concentration of PCBs in this pile of stored fluff is between 40 and 100 ppm".

The basis for Dr. Fingas' disagreement with this statement was his view that statistics could not be applied to material that is not normally distributed.

[198] In addition to relying upon the evidence of Dr. Fingas, Environment Canada argues that the language of the Regulations does not support the use of averages. In material part, the Regulations provide:

3. (1) Subject to subsections (2), (4) and (5), these	3. (1) Sous réserve des paragraphes (2), (4) et (5), le

Regulations apply in respect of any of the following PCB material that is not being used daily:

(a) PCB liquids in an amount of 100 L or more;

(b) PCB solids or PCB substances in an amount of 100 kg or more;

[...]

(3) For the purposes of subsection (1), the amount of PCBs, PCB liquids, PCB solids or PCB substances, as the case may be, shall be considered to be the following:

(a) in the case of a person who owns, controls or possesses PCB material that is in or on a property or on a parcel of land, the aggregate of all amounts of PCBs, PCB liquids, PCB solids or PCB substances, as the case may be, owned, controlled or possessed by that person

(i) in or on the property,

(ii) on the parcel of land, including the parcel of land on which the property referred to in subparagraph (i) is located,

(iii) on any parcel of land adjoining the land referred to in subparagraph (ii), and

(iv) within 100 m of any point situated on the outer limits of the land referred to in subparagraph (ii) and of the adjoining land referred to in subparagraph (iii); and

(b) in the case of a person who owns or manages a property in or on which PCB material is located or a parcel of land on which PCB material is located, the aggregate of all amounts of PCBs, PCB liquids, PCB solids or PCB substances, as the case may be, located

(i) in or on that property,

(ii) on that parcel of land,

(iii) on any parcel of land owned or managed by that person adjoining the land referred to in subparagraph (ii), and

(iv) within 100 m of any point situated on the outer limits of the land referred to in subparagraph (ii) and of the adjoining land referred to in subparagraph (iii). [underlining added]

présent règlement s'applique aux matériels contenant des BPC suivants qui ne sont pas utilisés quotidiennement :

a) des liquides contenant des BPC, en une quantité de 100 L ou plus;

b) des solides ou des substances contenant des BPC, en une quantité de 100 kg ou plus;

[...]

(3) Pour l'application du paragraphe (1), la quantité de BPC ou de liquides, solides ou substances contenant des BPC, selon le cas, correspond à :

a) dans le cas de la personne qui est le propriétaire de matériels contenant des BPC ou qui en possède ou en contrôle, dans ou sur un bien ou sur un terrain, la somme de toutes les quantités de BPC ou de liquides, solides ou substances contenant des BPC, selon le cas, dont elle est le propriétaire ou qu'elle possède ou contrôle et qui se trouvent :

(i) dans ou sur ce bien,

(ii) sur ce terrain, y compris celui sur lequel se trouve le bien visé au sous-alinéa (i),

(iii) sur tout terrain contigu à celui visé au sous-alinéa (ii),

(iv) en deçà de 100 m de tout point situé sur les limites extérieures du terrain visé au sous-alinéa (ii) et du terrain contigu visé au sous-alinéa (iii);

b) dans le cas de la personne qui est le propriétaire ou le gestionnaire d'un bien dans ou sur lequel se trouve des matériels contenant des BPC ou d'un terrain sur lequel se trouvent de tels matériels, la somme de toutes les quantités de BPC ou de liquides, solides ou substances contenant des BPC, selon le cas, qui se trouvent :

(i) dans ou sur ce bien,

(ii) sur ce terrain,

(iii) sur tout terrain dont elle est le propriétaire ou le gestionnaire et qui est contigu à celui visé au sous-alinéa (ii),

(iv) en deçà de 100 m de tout point situé sur les limites extérieures du terrain visé au sous-alinéa (ii) et du terrain contigu visé au sous-alinéa (iii). [Le souligné est de moi.]

Environment Canada argues that the respondents' reliance upon an "average" as the basis for determining whether the PCB Regulations apply, contradicts the word "aggregate" used in the Regulations. This is said to be so because the word "aggregate" in the context of the PCB Regulations is effectively the opposite of the word "average". To aggregate is to collect only similar units together, where as to average is to collect all dissimilar units together.

[199] The respondents rely upon the affidavit and expert report of Mr. Merks whose report was based upon statistical analysis of the test results. The respondents argue that statistical methods and applications are crucial to proper interpretation of the sampling data.

[200] Dealing first with the applicant's argument flowing from the use of the word "aggregate" in the Regulations, I disagree, respectfully, with the submission that the use of the word "aggregate" is inconsistent with the use of statistical averages. I accept the submission of the respondents that what is first required is that the suspect material be categorized. If some or all is categorized to be PCB material, then one must consider if the amount of PCB material when added up equals 100 kg or more.

[201] As to the exercise of characterizing suspect material, the Act is express in paragraph 2(1)(*i*) that in the administration of the Act the Government of Canada is to apply science and technology to identify and resolve environmental problems. Dr. Fingas was express in his affidavit that his task was to implement a program so "the results would scientifically determine" whether the ASR in question was PCB material. The proper characterization of ASR is therefore a question to be answered by science.

[202] Before one considers the conflicting evidence of Dr. Fingas and Mr. Merks it is necessary to deal with the argument that the opinion of Mr. Merks is irrelevant because his evidence relates to the calculation of the average concentration of PCBs in each cell or pile. I am unable to conclude that when dealing with a heterogeneous substance such as ASR the mean or average PCB concentration in each pile is irrelevant for the following reasons.

[203] First, Dr. Fingas swore that he was required to design and implement a methodology that would provide results that would be "representative of each entire cell". This is inconsistent with the position that Environment Canada now takes that what is relevant is smaller individual areas within each pile or cell.

[204] Second, in the 1997 and 1999 Environment Canada Reports, Dr. Fingas' results were expressed as an average for each entire cell or pile. Thus, for the 1997 and 1999 reports, the results were:

	Average (1997 Report)	Average (1999 Report)
General Scrap		
East pile	33.4 ppm	59.7 ppm
Central pile	35.9 ppm	41.2 ppm
West pile	85.4 ppm	54.6 ppm
XPotential		
Cell 5	61.3 ppm	50.7 ppm
Cell 6	96.7 ppm	42.0 ppm

On the basis of the 1999 Environment Canada Report, Dr. Fingas swore that "at the minimum, the east and west ASR cells at General Scrap, and both storage cells 4 and 5 and the drying cell at XPotential have average PCB concentrations in excess of 50 ppm, and are therefore properly considered PCB Material". [underlining added]

[205] In addition to Dr. Fingas' evidence, the affidavit of Shannon Kurbis, the Environment Canada enforcement officer, speaks to the use of average concentrations. At paragraphs 74 and 76 she states:

74. The Emergencies Science 1999 Report indicates that two ASR piles at General Scrap and three of the four storage areas at XPotential had average PCB concentrations that exceeded 50 ppm.

[...]

76. The average results taken from the Emergencies Science 1999 Report reflect the minimum PCB concentration. The letter accompanying the Emergencies Science 1999 Report states that General Scrap should take immediate steps to ensure that all PCB Material is stored in compliance with the *PCB Regulations*.

[206] This use by Environment Canada's own expert and enforcement officer of the average concentration of each entire cell or pile in order to characterize whether the cell or pile is PCB material belies this argument now advanced by Environment Canada that the average concentration is irrelevant.

[207] Finally, as Ms. Kurbis' affidavit shows, Environment Canada determined whether or not to bring enforcement proceedings on the basis of the average pile and cell concentrations set out above. Thus in February of 1998, Environment Canada advised the respondents that the General Scrap West Pile, and cells 5 and 6 at the XPotential site contained quantities of PCB in excess of the regulatory limit. On the basis of the 1999 Environment Canada Report the applicant asserts that both the East and West Pile at General Scrap and the drying cell and cells 4 and 5 at the XPotential site contain PCB material.

[208] In sum, Environment Canada (through Dr. Fingas) designed a sampling plan to provide results representative of the whole of each pile or cell and calculated the average concentration per pile and cell, then used the average concentrations as a basis for enforcement proceedings, and adduced evidence in this proceeding in terms of these average concentrations. I therefore do not now accept Environment Canada's submission that the average concentration per cell or pile is irrelevant.

[209] Having determined that average concentrations are relevant, what then of the conflicting opinion of Dr. Fingas and Mr. Merks as to the appropriateness of applying a statistical analysis?

[210] Mr. Merks was not cross-examined on his opinion, Dr. Fingas was. The following extract from Dr. Fingas' cross-examination is, in my view, telling:

393. Q And you keep coming back to that and we've had a lot of questions around that. So you're saying the application of statistics just doesn't apply with this type of material.

A That's correct.

394. Q And what's your authoritative source for that, other than yourself? Do you have a source that you can point me to that says statistical applications don't apply with ASR?

A Yes. Every textbook says one should not use normal statistics or statistics of that type on heterogenous non normal distributions.

395. Q ASR, do you have - - in any publications, because I've only got one and the one I've got says you should do it. So you show me the publication that says you can't do statistical application with ASR to determine whether it meets a regulatory threshold, because that's the issue we have before the Court today. Where's your authority? I'd like to see it.

A Well I have the authority in the sense that it's authority well known scientific principal one does not do normal statistics on non normal samples. This is you know, the first page of statistic textbooks.

[211] Unfortunately no specific texts or articles were identified by Dr. Fingas nor did he demonstrate that these were non normal samples. The reference by counsel in the extract quoted above to the publication dealing with ASR was to the 1992 EPA Report which specifically dealt with ASR and which stated that because of sampling and analytical errors "we must use statistical analysis" to obtain confidence intervals and levels of confidence.

[212] As noted, the 1992 and 1993 EPA Reports deal extensively with the use of statistics. Environment Canada, however, submits that there is no evidence before the Court that the EPA Reports are appropriately considered "best practices" for ASR sampling. Therefore, Environment Canada says that they ought not to be used to support or challenge the appropriateness of any sampling plan.

[213] My difficulty with this submission stems from the fact that the 1999 Environment Canada Report specifically lists both the 1992 and 1993 reports as references. Dr. Fingas agreed in cross-examination that the EPA is a recognized, reputable environmental regulatory authority, and stated that he specifically referenced reports in his 1999 Environment Canada Report that he used very heavily in his preparation. Dr. Fingas sent his sampling plan to the EPA for review where a statistician looked at it. This was presumably done because Dr. Fingas had no prior experience with the sampling and characterization of ASR.

[214] Further, by letter dated September 11,1997 Environment Canada responded to questions put forward on the respondents' behalf and stated that "[i]n response to your questions regarding sampling and analysis methodology, Environment Canada will be following standard sampling procedures as outlined in *Test Methods for Evaluating Solid Waste, Chapter 9, Sampling Plan*, Environmental Protection Agency, 1992. Analysis of all samples will be carried out according to the test methods specified in the Storage of PCB Material Regulations," as more specifically defined in the letter. The document referenced as being "*Test Methods for Evaluating Solid Waste, Chapter 9*" is the document which is described in these reasons as the 1992 EPA Report.

[215] In light of this use of the 1992 EPA Report and Dr. Fingas' reliance, in part, upon the EPA I am persuaded that it is relevant to consider what the 1992 EPA Report says about the use of statistics.

[216] The following extracts from that report are relevant:

This section of the manual addresses the development and implementation of a scientifically credible sampling plan for a solid waste and the documentation of the chain of custody for such a plan. The information presented in this section is relevant to the sampling of any solid waste, which has been defined by the EPA in its regulations for the identification and listing of hazardous wastes to include solid, semisolid, liquid, and contained gaseous materials. However, the physical and chemical diversity of those materials, as well as the dissimilarity of storage facilities (lagoons, open piles, tanks, drums, etc.) and sampling equipment associated with them, preclude a detailed consideration of any specific sampling plan. Consequently, because the burden of responsibility for developing a technically sound sampling plan rests with the waste producer, it is advisable that he/she seek competent advice before designing a plan. This is particularly true in the early developmental stages of a sampling plan, at which time at least a basic understanding of applied statistics is required. Applied statistics is the science of employing techniques that allow the uncertainty of inductive inferences (general conclusions based on partial knowledge) to be evaluated.

9.1.1 Development of Appropriate Sampling Plans

An appropriate sampling plan for a solid waste must be responsive to both regulatory and scientific objectives. Once those objectives have been clearly identified, a suitable sampling strategy, predicated upon fundamental statistical concepts, can be developed. The statistical terminology associated with those concepts is reviewed in Table 9-1; Student's "t" values for use in the statistics of Table 9-1 appear in Table 9-2.

[...]

9.2.2.1 Statistics

A discussion of waste sampling often leads to a discussion of statistics. The goals of waste sampling and statistics are identical, i.e., to make inferences about a parent population based upon the information contained in a sample.

Thus it is not surprising that waste sampling relies heavily upon the highly developed science of statistics and that a sampling/analytical effort usually contains the same elements as does a statistical experiment. [underlining added]

[217] The evidence of Dr. Fingas and Mr. Merks as to the appropriateness of statistical analysis are opposed. Mr. Merks was not cross-examined on his opinion, which opinion (for the reasons set out above) I have found to be relevant. The 1992 EPA Report which Dr. Fingas states he relied upon contemplates the use of statistics for the purpose of making inferences about a parent population based upon the information generated from a sample. Shannon Kurbis advised the respondents that Environment Canada would be following the standard sampling procedures outlined in the 1992 EPA Report. Dr. Fingas did not point to any specific article or book that would provide support for his view that statistics could not be applied to ASR, nor did he give evidence that he did any calculation to determine whether there was in fact a normal distribution.

[218] For these reasons, I find the opinion of Dr. Fingas to be less persuasive on this point than the opinion of Mr. Merks. I therefore accept the opinion of Mr. Merks that a statistical analysis is relevant, and for the reasons given by the respondents' witnesses and in the 1992 EPA Report I also accept that a statistical analysis is required in order to interpret properly the data.

[219] Having concluded on the evidence adduced in this application that a statistical analysis is required in order to interpret properly the data, it follows that I accept the opinion of Mr. Merks that the mean PCB concentration in each of the sampling units is lower that the regulatory threshold and that the ASR does not constitute PCB material. In accepting Mr. Merks' opinion I have regard to the fact that Environment Canada did not challenge any of the primary data he relied upon, and did not challenge the propriety of his actual statistical analysis. Rather, Environment Canada challenged the appropriateness of the use at all of statistical applications.

[220] In so concluding, I have considered the submission of counsel for the applicant that the statistical analysis is an exercise performed by "mathemagicians" and its "poof and all the high numbers are gone". While an evocative image, logically all of the low numbers vanish as well. I accept on the evidence that recourse to the mean concentrations is appropriate in view of the error that is inherent in individual sample results.

[221] In this regard, I think that it is of some assistance to compare the results Dr. Fingas obtained in his 1997 and 1999 reports as set out above at paragraph 204. The sampling plan and methodology did not differ significantly between the two reports. While the analytical chemical protocols differed, (in that 1/RM/3 was used in 1999 and 1/RM/31 was used in the 1997 report) Dr. Fingas testified that some studies showed that there was no difference in qualification between using the two different analytical protocols. The results therefore may properly be compared.

[222] Comparing the results, in 1997 Environment Canada determined the areas containing PCB material to be the West Pile at General Scrap and cells 5 and 6 at XPotential. In 1999, the East Pile at General Scrap was said to contain PCB materials, but cell 6 at XPotential did not. In 1997 Environment Canada reported that the East Pile had an average PCB concentration of 33.4 ppm compared with 59.7 ppm in 1999. The West Pile was reported to have a PCB concentration of 85.4 ppm in 1997 and 54.6 ppm in 1999. No new ASR had been added to either pile after around 1994. An Environment Canada publication in evidence states that PCBs do not decompose or biodegrade significantly in the natural environment.

[223] On the basis of logic and common sense, it would seem that a scientifically valid and reliable methodology ought not to produce such disparate results for the East and West Piles.

[224] I have also considered the submissions of the applicant that the EPA Final Rule (1998) ("Final Rule") provides support for the Environment Canada approach.

[225] The Final Rule is a statutory instrument, an extract of which was put in evidence, by consent, as a result of questions addressed to Mr. Clark by the Court. No other witness or affidavit referred to the Final Rule.

[226] Mr. Clark advised that under sub-part R the Final Rule prescribes procedures for developing representative samples. The 1993 EPA Report is specifically referenced in the Final Rule as one of the methods to be used and followed for determining the PCB concentration of samples. Mr. Clark relied upon the Final Rule with respect to sample size, sub-sampling and the concept of compositing samples.

[227] Environment Canada argues that there is no reference in the Final Rule to any statistical analysis and so it is persuasive evidence of how analytical results ought not to be applied to PCB contaminated ASR. Environment Canada also asserts that it is informative that the Final Rule makes no mention of the 1993 EPA Report and only mentions the 1992 EPA Report in addressing laboratory protocols. Environment Canada also relies upon portions of sub-part N of the Final Rule.

[228] Given the limited use of the Final Rule by Mr. Clark, and the fact that no other witness referred to the document I am not prepared to give any significant weight to the document.

[229] No evidence was adduced as to the applicability of sub-part N to the situation at issue and it was not suggested to Mr. Clark that sub-part N was applicable. No evidence was adduced as to the interrelationship, if any, between the 1992 and 1993 EPA Reports and what is apparently a statutory instrument.

[230] Further, if in 1998 the EPA departed in a significant manner from views or positions expressed in the 1992 and 1993 EPA Reports it is reasonable to infer that Dr. Fingas would have referenced this either in his report of January 1999, or in his affidavit sworn in 2000 in this proceeding, or in his oral evidence. He did not refer at all to the Final Rule, but specifically referenced in his report and his testimony the 1992 and 1993 EPA Reports.

[231] One final argument advanced by Environment Canada must be considered. That is its submission that if the appropriate method for determining compliance is the statistical calculation of the average concentration and the confidence intervals for the cell or pile as a whole, the respondents' data establishes that the drying cell and cell 5 at XPotential and the West Pile at General Scrap are PCB materials. This is said to be so because these cells and this pile returned averages which, combined with the statistical confidence intervals, have the upper limit of the confidence interval over 50 ppm. Environment Canada relies upon the following extract from the 1992 EPA Report:

If the upper limit is less than the threshold, the chemical contaminant is not considered to be present in the waste at a hazardous levels; otherwise, the opposite conclusion is drawn.

[232] However, close examination of the relevant portion of the 1992 EPA Report shows that in that report the applicable equation for determining the confidence interval determined an 80% confidence interval. The numbers relied upon by Environment Canada in the respondents' data were determined at an 95% confidence level. If the respondents' data is re-calculated at an 80% confidence level (which is the level contemplated by the EPA Report, and which calculation was done in Court) the upper limit of the confidence interval is less than the regulatory threshold. Therefore, the data does not support the contention that the two cells and pile contain or constitute PCB material.

III. IF SOME OR ALL OF THE ASR IS PCB MATERIAL, WHICH RESPONDENTS ARE IN BREACH OF THE REGULATIONS?

[233] My finding that Environment Canada has failed to establish that some of the ASR is PCB material makes it unnecessary for me to deal with this. However, even if some ASR at the General Scrap site was PCB material, I see no basis in the evidence for any liability on the part of either individual respondent or on the part of Jamel in respect of the General Scrap site.

[234] Mr. Lazareck's evidence was clear and unchallenged that IPSCO now owns 100% of General Scrap, that Jamel provides employee services to General Scrap, but Jacob and Melvin Lazareck are no longer involved in the day-to-day operations of General Scrap. The only evidence of the nature of the employment services provided by Jamel was that the payment of the General Scrap payroll is handled through Jamel.

[235] The obligation imposed by the Regulations with respect to PCB material is placed upon a person who owns, controls or possesses PCB material.

[236] On the evidence none of Jamel, Melvin Lazareck or Jacob Lazareck own, control or possess PCB material at the General Scrap site.

IV. CONCLUSION, ORDER AND COSTS

[237] In view of my findings on the evidence, I see no reason to consider whether in the ultimate exercise of the Court's discretion an injunction should issue.

[238] For the reasons given, the application for injunctive relief is dismissed. It follows, and the parties agree, that the interim consent order should be set aside.

[239] As requested by counsel the issue of costs is reserved. Before January 31, 2004 counsel for the respondents should contact the Registry to request a teleconference for the purpose of discussing how the outstanding issue of costs is to be dealt with.

ORDER

[240] IT IS HEREBY ORDERED THAT:

1. The application for injunctive relief is dismissed.

2. The interim consent order issued in this proceeding by Madam Justice Heneghan is set aside.

3. The issue of costs is reserved for further submissions.

"Eleanor R. Dawson"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2274-00

STYLE OF CAUSE: The Queen v. IPSCO Recycling Inc. et al.

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: April 3, 4, 7, 8 and 9, 2003

June 23 and 24, 2003

REASONS FOR ORDER:

AND ORDER: Hon. Madam Justice Dawson

DATED: December 23, 2003

APPEARANCES:

Duncan A. Fraser FOR THE APPLICANT

Joel I. Katz

James G. Edmond FOR THE RESPONDENTS

John D. Stefaniuk

SOLICITORS OF RECORD:

Morris Rosenberg

Deputy Attorney General FOR THE APPLICANT

of Canada

Thompson Dorfman Sweatman FOR THE RESPONDENTS

Winnipeg, Manitoba

TAB 10

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2011 SKQB 237**

Date: **2011 06 20**
Docket: Q.B. No. 167 of 2011
Judicial Centre: Prince Albert

BETWEEN:

NORTHERN VILLAGE OF AIR RONGE

APPLICANT/PLAINTIFF

- and -

LARRY WERCHOLA and VIOLET WERCHOLA,
Operating as LA FAMILY TAXI

RESPONDENT/DEFENDANT

Counsel:

J. R. Fafard — for the applicant/plaintiff
T. W. Klassen — for the respondent/defendant

FIAT — ROTHERY J.
June 20, 2011

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[1] The plaintiff, the Northern Village of Air Ronge (the "Village"), sues Larry Werchola and Violet Werchola for breach of the Village's Zoning Bylaw #187 of 2000 (the "Bylaw") that prohibits a taxi operation as a home based business on the property where the Wercholas reside, being 188 Vickers Crescent.

[2] On this application, the Village seeks an interlocutory injunction, pursuant to s. 390 of *The Northern Municipalities Act 2010*, S.S. 2010, c.N-5.2 (the "Act"), restraining the Wercholas from continued operation of their taxi business from 188 Vickers Crescent and from having, parking, or driving taxis on that same property.

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[3] Section 390 of the Act states:

> (1) In addition to any other remedy and penalty imposed by this or any other Act or a bylaw, a municipality may apply to the court for an injunction or other order:
>
> > (a) to compel a person to carry out any duty imposed by law on that person in favour of the municipality or in favour of all or some of the residents of the municipality; or
> >
> > (b) to restrain a person from contravening this or any other Act or bylaw that concerns the municipality or all or some of the residents of the municipality.
>
> (2) Without restricting the generality of subsection (1), a municipality may apply to the court for an injunction or other order if:
>
> > (a) a building or structure is being constructed in contravention of an enactment that a municipality is authorized to enforce or a bylaw;
> >
> > (b) a contravention of this Act, another enactment that a municipality is authorized to enforce or a bylaw is of a continuing nature; or
> >
> > (c) any person is carrying on business or is doing any act, matter or thing without having paid money required to be paid by a bylaw.
>
> (3) The court may grant or refuse the injunction or other order or may make any other order that in its opinion the justice of the case requires.

[4] It is clear from the legislation that the Village is entitled to seek injunctive relief. It is not restricted to prosecuting the defendants for breach of the Bylaw first.

[5] The factors for granting the Village an interlocutory injunction are not the factors usual to injunctive applications. What must be proven is that the Village has a strong *prima facie* case. As reviewed by Geatros J. in *Regina (City) v. Cunningham*

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(1994), 119 Sask. R. 299, 20 M.P.L.R. (2d) 250, [1994] S.J. No. 191 (QL) (Sask. Q.B.) at para. 10:

> Ordinarily there is a three-stage test for the granting of interlocutory injunctions, the requirements being (1) a fair question to be tried; (2) irreparable harm; and (3) balance of convenience favouring the injunction: *American Cyanamid Co. v. Ethicon Ltd.* (1975), 1 All E.R. 504 (H.L.). The City is required to establish that there is a substantial issue to be tried by way of demonstrating a strong prima facie case. The strength of the City's case is the predominant consideration. The irreparable harm and balance of convenience factors become more or less redundant where there has been a deliberate and persistent breach of the law. See *Municipality of Metropolitan Toronto v. N.B. Theatrical Agencies, Inc.* (1984), 4 D.L.R. (4th) 678 (Ont. H.C.). ...

[6] Indeed, a municipality need not demonstrate that it will suffer irreparable harm if it sets out a case where someone is violating a bylaw. This was succinctly reviewed in the case of *Markham (Town) v. Eastown Plaza Ltd.* (1992), 11 M.P.L.R. (2d) 134, (Ont. Gen.Div.) at p. 138:

> ... The real issue here is the competing interest of the town which represents the public interests of its citizens and the private interests of the defendants, who, notwithstanding the notices given to them, continued to pursue the establishment of their business. There are special considerations applicable to municipalities which were enumerated in a number of the cases cited to me. (See *City of Kamloops v. Southern Sand & Gravel Co.* (1987), 43 D.L.R. (4th) 369 (B.C.S.C.); *City of Toronto v. Polai*, [1970] 1 O.R. 483 (C.A.); aff'd in the Supreme Court of Canada and the *Municipality of Metropolitan Toronto v. N.B. Theatrical Agencies Inc.* (1984), 44 O.R. (2d) 574 (H.C.J.). In my view, the principle enunciated in *Municipality of Metropolitan Toronto v. N.B. Theatrical Agencies Inc.* (1984), 44 O.R. (2d) 574 (H.C.J.) is an appropriate authority to be applied in these circumstances. I refer in particular to the Honourable Mr. Justice Craig's comments at p. 580:

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> "A municipality whose duty is to enforce its by-laws need not show that it will suffer irreparable harm in the same way that it must be established by a private plaintiff. Where by-laws of a municipality are being flagrantly violated a court ought to assist the municipality by granting interlocutory relief..."

> On the basis of these authorities, I am satisfied that the municipality, by virtue of its obligations to its citizens, is in a different position from an ordinary litigant and this special status gives rise to special considerations which prevail in situations such as this one. The irreparable harm if this injunction is not granted is to the municipality who has obligations to its citizens to enforce and maintain by-laws designed for what may be referred to as the quiet enjoyment of its citizens. The municipality, to put it most simplistically, has a duty to protect its residents by the passing and implementation of by-laws. The citizens have a right to quiet enjoyment and in addition, and perhaps most importantly, from a policy perspective, its citizens have a right to anticipate that the by-laws of the town will be adhered to. For these reasons, I am of the view that the balance of convenience favours the municipality in these circumstances.

Also see: *Regina (City), supra,* at para. 12.

[7] Another principle of granting injunctive relief to a municipality is that it is no defence to an action by the municipality that there may be other cases of infringement of a bylaw which have not been addressed by the municipality. The Supreme Court of Canada made this clear in the case of *Magdalene Polai v. The Corporation of the City of Toronto* [1973] S.C.R. 38, where it stated at p. 41:

> ... A ratepayer has a right of action. It is no defence against his action to say that there are other cases of infringement which had not been questioned. In this particular case, it is obvious that the immediate neighbours were the ones who were objecting. This gave the evidence. It makes no difference whether they bring the action or the municipality brings the action. The City, in this action, is seeking to protect and enforce a public right, and should not be denied the remedy of injunction merely because others, in addition to the defendant, are guilty of similar violations and have not been restrained.

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[8] Within the context of the legislation and the legal principles, the facts in this application are as follows. Neighbours who live on Vickers Crescent have been complaining to the Village about the number of taxis coming and going from the Wercholas' residential property, the number of taxis parked in the driveway, and the sounds of dispatching coming from their open windows.

[9] The Wercholas, on their own affidavit evidence, stated that they used to have a taxi operation at 119 Cuthand Street, La Ronge, Saskatchewan. That address was also their place of residence. Because that property deteriorated, they bought a home at 188 Vickers Crescent, Air Ronge, and took possession May 1, 2010.

[10] Observations by neighbours of numerous taxis coming and going from 188 Vickers Crescent started about November, 2010.

[11] On Werchola's own evidence, they did not rent premises for dispatching taxis until April 7, 2011. They signed a rental agreement for the property located at 1305 La Ronge Avenue, which allows a radio antennae to be erected and has parking space. They deny that they dispatched taxis from 188 Vickers Crescent prior to then, although they no longer had the property at 119 Cuthand Street operating as a taxi dispatch centre.

[12] Clause 4.9.3 of the Bylaw states:

> Without limiting the authority of the Development Officer to deny applications for other types of home based businesses which do not meet the requirements of this bylaw, the following uses are prohibited as home based businesses, whether or not application for such uses would otherwise comply with the applicable standards of this Bylaw:
>
> ...
>
> (7) headquarters, dispatching or base of operations of a trucking, taxi, delivery, or towing operation;

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[13] I find that, when the Village commenced these proceedings, it had a strong *prima facie* case that the Wercholas were using 188 Vickers Crescent as the headquarters, dispatching and base of their taxi operation. However, they now carry out their dispatching from the rental property at 1305 La Ronge Avenue.

[14] The issue that remains is whether, by parking so many taxis in their driveway, and by using their residence as a place for drivers changing shift in driving the taxis constitutes the Wercholas continuing to treat 188 Vickers Crescent as a base of operation. Again, on the Wercholas own affidavit evidence, I find that they are doing so.

[15] The Wercholas own eight taxi plates. They employ four drivers who park their vehicles in their own driveways when they are not operating them. There are four members of the Werchola family who live at 188 Vickers Crescent and who drive taxis. Larry and Violet work the day shift; their son Cliff and nephew, Calvin Zuk, work the night shift.

[16] The Wercholas state that they had parked the taxis at 188 Vickers Crescent until a business location could be found because of vandalism they used to experience at the 119 Cuthand Street property. Thus, the evidence is clear that, at least until the rental agreement in April, 2011, for the property at 1305 La Ronge Avenue, the Wercholas were using 188 Vickers Crescent as a place to safely store the taxis when they were not being operated.

[17] The Wercholas denied that more than six taxis were being parked in their driveway, and point out that four of the vehicles are operated by residents of their own home. Observations by neighbours that numerous taxis are parked on a regular basis in

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the driveway raise concerns that the driveway is continuing to be used as a parking site for the taxi operation. If that continues, the Village is entitled to injunctive relief.

[18] That being said, the four residents of 188 Vickers Crescent should be allowed to park their own vehicles in their own driveway when the taxis are not in use. However, that is a maximum of four vehicles. Because Cliff and Calvin work the night shift, on most occasions, there should be only two taxis parked in the driveway, those of Larry and Violet.

[19] The residents of 188 Vickers Crescent should also be entitled to clean out their vehicles on a Sunday afternoon in their own driveway.

[20] What constitutes this business continuing to use 188 Vickers Crescent as a base of operation is where the driveway is utilized to park taxis and where 188 Vickers Crescent is used as the headquarters for implementing shift changes of taxis, rather than the dispatch site at 1305 La Ronge Avenue.

[21] Therefore, the Village is granted an interlocutory injunction restraining the defendants from using 188 Vickers Crescent, Air Ronge, Saskatchewan as a place that is used for the headquarters, dispatching or base of operation. As further clarification, the defendants are restrained from using 188 Vickers Crescent as a place to park taxis, other than taxis driven by the residents of 188 Vickers Crescent. The defendants are further restrained from using 188 Vickers Crescent as a site for implementing shift changes for taxi drivers in their business.

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[22] Because this is not an absolute restriction, in that the defendants may house their own vehicles on their property, misunderstandings may arise as to whether they have disobeyed this interlocutory injunction. Therefore, before any enforcement of this injunction is undertaken, the parties may return the matter to me for further order or direction.

[23] Costs are left to the discretion of the trial judge.

J.
A. R. ROTHERY

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TAB 11

COURT FILE NO.: 77668/05
DATE: 2006/09/29
CORRIGENDA: 2006/10/03

2006 CanLII 33316 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
THE CORPORATION OF THE TOWN OF NEWMARKET	)	Marc McAree and Vivienne Ball, for the Applicant
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
HALTON RECYCLING LTD.	)	David Crocker, Jonathan Davis-Sydor, for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** August 8, 9, 10, 11, 28, 29, 30, 31 and September 1, 2006

REVISED REASONS FOR JUDGMENT

The text of the original Reasons for Judgment has been corrected with text of Corrigenda released October 3, 2006, appended.

BRYANT J.

I OVERVIEW

[1] Halton Recycling Ltd. ("Halton") operates an organic waste processing facility at 395 Harry Walker Parkway South in the Town of Newmarket ("the Town"). The storage and processing of the organic wastes produce odours. Section 433 of the recently revised *Municipal Act* authorizes a

municipality to apply to the Superior Court of Justice for an order requiring that all or part of premises within the municipality be closed for any use for a period not exceeding two years because the activities or circumstances on or in the premises constitute a public nuisance that has a detrimental impact on the use and enjoyment of property in the vicinity of the premises.

[2] The Town seeks an order closing Halton's facility for two years pursuant to s. 433 of the *Municipal Act*. The Town submits that Halton's recycling processes cause odorous emissions which constitute a public nuisance. Halton submits that its activities do not contravene s. 433 because the emissions from its operations do not constitute a public nuisance, have not caused the loss of use and enjoyment of property and Halton has taken adequate steps to eliminate the odours.

[3] The parties filed a large volume of materials. The materials included Ministry of Environment ("MoE") certificates of approval, provincial officer's orders, consultant's reports, maps, affidavits, transcripts of cross-examinations of affiants, correspondence, business records and other documents. No witnesses testified during the two-week hearing.

[4] The parties filed factums and books of authorities. Counsel advised that s. 433 has not been judicially considered.

II STATUTORY PRECONDITIONS

[5] Subsection 433(2) requires a municipality to obtain the consent of the chief of police of the Town prior to making an application for closure of the premises. The consent shall not be refused unless the chief of police forms the opinion that the application may have an impact on police operations. Counsel agreed that the chief of police provided a statutory declaration giving his consent.

[6] Subsection 433(3) requires the municipality to give 15 days notice to the Attorney General of its intention to make an application for closure under s. 433. A municipality is permitted to bring the application if the Attorney General does not comment within the 15-day comment period. Subsection 433(5) authorizes the Attorney General to take over or terminate the application or participate in the hearing personally or by counsel. The Attorney General did not comment on the application, did not take over the application or make submissions through counsel at the hearing.

[7] The Town received more than 1100 odour complaints (one complaint per person per odour detection) between July 2004 and July 2006. The Town submitted that it reluctantly brought the application for closure because elected representatives, its officials, area businesses and residents believed that the Ministry of Environment had not properly exercised its statutory authority in relation to the odour complaints and lacked confidence that the Ministry would properly exercise its regulatory authority to eliminate odours in the future.

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[8] I do not know the MoE's current position concerning the odour complaints because the Attorney General did not intervene or instruct counsel[1] to make submissions on this application. Accordingly, I do not have evidence of the MoE's technical opinion as to the adequacy of steps taken by Halton to eliminate the discharge of odours or its level of confidence that Halton's remedial action plan will mitigate or eliminate the odours in the future.

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III THE OWNERSHIP OF THE WASTE PROCESSING FACILITY

[9] Halton's waste processing facility was owned and operated by CCI Newmarket Ltd. from 1999 until it went into receivership in 2003. The Town received numerous complaints from area businesses and residents about odours during the period CCI operated the plant.

[10] Halton purchased the facility in November 2003 and took title to the premises in April 2004. Halton knew that remedial work was necessary to limit odour emissions prior to purchasing the facility. Halton made modifications to the physical plant and processes and installed new equipment to minimize emissions and odour impacts prior to commencing its operations on July 24, 2004. The company spent $7.0 million dollars between November 2003 and September 2004 on these changes. Halton spent a further $1.0 million for equipment and process changes as part of its remedial action plan to reduce emissions. Halton submitted plans and specifications for the final stage of its remeadial action plan to the MoE on May 8, 2006. Halton cannot implement this stage until it receives a certificate of approval from the MoE.

[11] Halton processes source-separated organics ("SSO") pursuant to its contract with the City of Toronto. SSO consists primarily of kitchen waste and other organic material put into a "green bin" by homeowners. The process is designed to produce compost and green electricity. Halton also processed leaf and yard waste during its first year of operation.

IV ISSUES

[12] Section 433 is a specific statutory provision authorizing the Superior Court to make an order to close premises within the municipality for a period not exceeding two years. The Court must be satisfied on a balance of probabilities that: (1) the organic waste recycling activities on the premises constitute a public nuisance or cause activities constituting a public nuisance in the vicinity of the premises; (2) the public nuisance has a detrimental impact on the use and enjoyment of property in the vicinity of the premises, including, but limited to, impacts such as… noise or… activities that have a significant impact on property values…; (3) the owner or occupants of the premises knew or ought to have known that the activities constituting the public nuisance were taking place and did not take adequate steps to eliminate the public nuisance.

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[1] Ministry of Environment legal staff are seconded members of the Attorney General's Department.

V POSITION OF THE PARTIES

[13] The Town recorded 1069 odour complaints over a two-year period. Counsel submitted that Halton discharged noxious, foul and penetrating odours from its premises as a result of its recycling activities since July 2004. The Town submitted that the odours disrupted the workplace, affected the physical well-being and the lifestyle of residents within the vicinity of the Halton facility. Counsel argued that the discharge affected the comfort and convenience of local residents and employees of nearby businesses and materially diminished their use and enjoyment of their places of employment and homes.

[14] Halton submitted that the Town's odour complaints tracking system was faulty and overstated the number of complaints. Counsel submitted there were other sources of odours that were erroneously attributed to Halton. Counsel argued that the local residents were sensitized to odour complaints and blamed Halton for odours that were caused by other businesses. Also, the community group known as "RASH" (Residents Against Stinky Halton) encouraged others to respond to perceived odours. Counsel argued that some complaints were not verified and other complaints were inconsistent with the anomometer records tracking wind direction.

[15] Halton submitted that the affidavit evidence supporting the complaints was limited to a few individuals. Counsel further submitted that the number of complaints has decreased as a result of the mitigative measures taken by the company. Halton argued that the Court should only rely upon current complaints and that historic complaints are irrelevant. Counsel argued that odours could be a private nuisance and did not constitute a public nuisance.

VI PUBLIC NUISANCE

(a) The Evidence

[16] The Town created a comprehensive system for tracking odour complaints. Wendy Corrigan, an administrative assistant employed by the municipality, received complaints from residents and businesses complaining about odours from CCI for the years 1999 to late 2003. Halton commenced its operations on July 24, 2004 and the Town received its first odour complaint on the morning of July 28, 2004. In February 2005, Ms. Corrigan began using a standardized complaint form indicating the name, address and phone number of the complainant, date and time of call, location of detection of the complaint, a description of the odour and its impact.

[17] Halton recorded complaints received directly from the public on its standard form which included similar information required on the Town's form. Halton faxed this information to the Town for inclusion in its records of complaints. In addition, Halton recorded the results of its site investigation of the complaint, operation data corresponding to the time of the complaint and weather data from its anomometer.

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[18] The RCMP Toronto North Detachment located at 345 Harry Walker Parkway is a three-story building. The RCMP detachment is approximately 200 metres north of the Halton facilities. There are approximately 300 persons working at the detachment of whom 90% are police officers and 10% are public servants, contract employees and administrative assistants. The RCMP set up its own e-mail complaint system to record complaints from officers and employees. These complaints were forwarded to Ms. Corrigan for inclusion in her records.

[19] Ms. Corrigan collected the complaints from all sources and forwarded the information to the MoE, Halton and other persons and organizations. Ms. Corrigan made three supplementary affidavits updating and correcting the Town's collated complaints records to July 2006. Ms. Corrigan's affidavits attached a chart indicating the identity of the complainants, location of complaint, description of the complaint etc. In the third supplementary affidavit, she acknowledged there were 209 odour complaints that were duplicated in her earlier affidavits. Ms. Corrigan's corrected version recorded 1169 odour complaints between July 28, 2004 and July 24, 2006.

[20] The complaints were catalogued in chart form, which was attached to Ms. Corrigan's affidavit. In addition, the location and number of complaints were marked on a map that was attached to her affidavit. The map contains concentric zones indicating the location of the complaints and the distance from the Halton facility.

[21] In April 2005, the Town instituted a "24/7 on-call service" to respond to the large number of complaints made by businesses, individuals and residents about odours attributed to Halton. Mr. Bickers, a by-law enforcement officer, described the system and efforts made by the municipality to verify the source of the odour complaints in his affidavit. He said that except on rare occasions the odour complaint could be traced to the activities of Halton. He described the odour as putrid, very foul, dirty, musty, and gross. He stated that the smell is identifiable and unforgettable - it is a garbage-like odour, an earthy mixture of rotting material. The odours varied in intensity.

[22] Mr. Tremblay, the chief building officer and director of by-laws visited the premises on at least fifty occasions before November 2005. It was his evidence that the processing of organic wastes causes the discharge of foul odours that is distinguishable from other odours. He said it smells like rotting garbage and varies from mild to nauseating. He has smelled the odours on at least twenty occasions, including at East Hill Court approximately 880 metres from Halton's premises. He was able to confirm the source of the odours on most occasions.

[23] Mr. Tremblay stated there were no other industrial operations in the vicinity that produce this type of odour. He stated that 50% of complaints were within a 600-metre radius of Halton and more than 80% were within a 1200 metre radius.

[24] Local residents described the odours as bad, putrid, pungent, sickening, horrendous, foul, obnoxious and smelling like feces. The complainants' evidence was that the odours caused gagging, penetrated their homes spoiling meals and social events and their use and enjoyment of their homes.

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[25] Ms. Weiman, an East Hill Court resident, worked from her home office. She said that the bad odours caused her daughter's eyes to become puffy, red, irritated and watery. She smelled foul odours from Halton and reported the odour problem to Halton, the Spills Action Centre of the MoE and municipal officials. It was her evidence that the odours impaired her ability to enjoy her property and her ability to work in her home office on one occasion. She cancelled a meeting at her home due to the odours and Halton reimbursed her for travel expenses because she was required to reschedule the meeting for downtown Toronto.

[26] Inspector Goulet, the RCMP detachment commander, said that the federal Crown owned the detachment and the RCMP could not move from their recently constructed building (1996). He said that the odours were putrid and smelled like baby diapers. The smell made him gag and his eyes water and caused his clothing and vehicle to stink. He confirmed that the odours originated from Halton. He experienced this odour on ten to fifteen days a month during the period July 2004 to November 24, 2005. He said the air ventilation system took several hours to clear odours after a bad event.

[27] During this period, on at least twenty-five days, the odours were so offensive that some individuals left work and went home. He said the odours affected office morale and that productivity dropped when the odours were bad. Inspector Goulet said that initially Halton reimbursed individuals for out-of-pocket costs to clean their vehicles and/or dry clean their clothes. Halton stopped this practice prior to November 2004.

[28] The RCMP conducted an air-sampling program in August 2005 to determine if toxic or harmful organisms were present in the indoor air. No health hazards were identified.

[29] Sgt. Penny is a member of the RCMP odour committee. He made seven odour complaints. He described the odour as a garbage-like dump smell that was disgusting and horrendous. On one occasion it made his eyes burn. He found it was frustrating to come to work and smell the vile odour of rotting garbage. He confirmed that the source of the odours detected at his office originated from Halton because the smell had a distinct recognizable smell. It was his evidence that on some days the odours were intolerable and negatively impacted his office work. He said on bad odour days it affected office morale and it was extremely difficult to concentrate.

[30] Mr. Kamin was employed by the RCMP as a records clerk since 1998. He smelled a strong feces-like odour coming from Halton that lingered the entire workday of January 11, 2006. On January 13, 2006 the smell affected his ability to concentrate. He said that when the odour infiltrated the detachment it was circulated by the HVAC system throughout the building even after the outside air became odourless. He detected the same smell at his residence located approximately 1 km from the Halton processing facility. He attributed headaches and sleep impairment to the odour. He said that the RCMP permitted employees to leave work if the smell was unbearable without utilizing a sick day. He was certain that Halton was the source of these odours.

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[31] Ms. Owens, a registered nurse, first noticed odorous emissions from the facility when CCI was operating the plant in 2001. She said that the odours increased in frequency and lasted for a longer period when Halton took over the waste processing facility. She compared the odours to a combination of rotting flesh and feces; sometimes the odour had a sickening sweet smell and on other occasions the odour smelled like dirty diapers and garbage. The odours varied from slight to those that made her want to gag. Ms. Owens experienced these odours on many occasions during the past two years.

[32] Ms. Owens said that the odours affected her mother's sleep and appetite. It was Mrs. Owens' evidence that she experienced watery, sore eyes and suffered stomach upsets due to the odours. She claimed that she vomited twice and became physically ill from the odours. Periodically, the odours woke her up at night. She said the odours affected the use and enjoyment of her property.

[33] Mr. McEwin, another East Hill Court resident, described his efforts to trace the odour to the Halton facility. He described the odours as putrid and sickening. He expressed frustration that his time spent confirming the odours and calling the Town and SAC to complain about them should be pleasantly spent enjoying his retirement.

[34] Ms. Riley, the director of office administration of the Community Care Access Centre ("CCAC") of York Region, said that she first detected odours from Halton in September 2004. In August 2005, the odour problem was more severe than it had been when CCI operated the facility. She said the odour problem caused significant interference to employees in the workplace. She described the smell as a rotting smell, reminiscent of excrement. She said the odours were thick and pungent and seemed to stay in one's throat. She said that after being exposed to the odour, she could taste it when drinking coffee. It was Ms. Riley's evidence that the odours caused physical discomfort to CCAC employees and she received complaints from employees concerning headaches, nausea, gagging, and sore throats and burning eyes.

[35] Ms. Tara Stokes, a mail carrier with Canada Post, delivered mail to Halton and the surrounding area. She stated that she detected the odours from Halton along her entire route. She said the odours at the RCMP facility were almost as bad as at Halton which she described as a combination of dirty socks, dirty underwear, puke and mucous. She said that the odour made her feel sick to her stomach and nauseous. On one occasion, in March 2005, the odours were so unbearable that she threw up. Finally, she said the odours made her eyes sting. She arranged her route to make Halton the last delivery of the day.

[36] The affidavits from other individuals were similar in that they confirmed the nature of the odours and corroborated the impact the odours had on their workplace or home life.

[37] Dr. Ciccone, a professional engineer with extensive experience in the investigation and modeling of air quality projects, made one site visit and reviewed the complainants' affidavits sworn in November 2005. It was his opinion that the adverse impacts described by the affiants were

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consistent with odour emissions associated with organic waste processing plants. It was his opinion that the decomposition of waste material generates sulphur-based odours. The MoE certificate of approval (air) requires Halton to conduct source testing for sulphur omissions. This confirms Dr. Ciccone's opinion that the omissions from Halton contain sulphur. He said that these sulphur-based odours cause physical reactions such as "burning eyes and burning throat" and eyes that were red and sore. It was his opinion that the high frequency of odour complaints within a 600-metre radius of Halton was consistent with the dispersion modeling carried out by Ortech consultants for CCI.

[38] Halton relied on the affidavit of Mr. Piersol, an air expert retained by Halton, the cross-examination of the complainants who provided affidavits in 2006, the cross-examination of Dr. Ciccone, the affidavit of Mr. Hagedus, the regional safety and compliance manager for Halton's Newmarket facility, his records of complaints and verifications. The thrust of their evidence in relation to the public nuisance issue focused on other sources that have caused the discharge of bad odours wrongly attributed to Halton, that the odours would be resolved in the near future and inaccuracies identified in the odour complaint system.

[39] Halton retained Mr. Piersol of Ortech Environmental in the spring of 2005 to assist the company with its odour emissions from its processes and fugitive emissions. Mr. Piersol, an engineer and expert in emissions had provided advice to CCI. He said that there was an 80% reduction in odour emissions since Halton initiated the remedial action plan in September 2005. He described how the reductions were achieved and opined that additional remedial measures would meet MoE requirements.

[40] Mr. Piersol confirmed that his firm collected air samples at the RCMP building and at East Hill Court when the winds were blowing from the south and the southeast. These collected samples were presented to panellists to determine ambient air quality. In a blind test, the panellist said air samples had a rotten smell and associated the odour with manure and compost. This confirmed that emissions from Halton were detectable at East Hill Court. Mr. Piersol said that the odour exceeded one odour unit at the RCMP detachment and at Easthill Court at the time of sampling.

[41] Mr. Piersol was confident that one odour unit emission rate required under Halton's certificate of approval would be achieved when the final phase of the remedial plan was completed. He said that the plan would be completed within three months of receiving approval from the MoE to implement the plan. He acknowledged that Halton must reduce its odour emissions by a further 20% to achieve the goal of 99.9% elimination of odour. He was confident that Halton would achieve this goal. There was no expert opinion contradicting Mr. Piersol's opinion.

[42] Halton received odour complaints from JB Printing on Monday mornings. Mr. Piersol took air samples at an exhaust stack. He detected the presence of chemicals that were unrelated to Halton's activity. He did not detect odour outdoors near JB Printing. Mr. Piersol attributed the chemicals to the company's printer.

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[43] The Town conducted an investigation inside JB Printing and determined that the odours were attributable to faulty sewer traps of unused drains. Once this problem was corrected, the odour problem at JB Printers was eliminated. I find that the odours at JB Printing were not the source of offensive odours detected by the individuals living and working in the vicinity of Halton's facility.

[44] Mr. Hegedus suggested that the sewers servicing JB Printing were connected to the sewers servicing the East Hill Court residents. Halton argued that sewers could be a source of the odours identified by the residents. I accept the evidence of Brian Jones, the Director of Public Works for the Town, that the sewer servicing JB Printing was not connected to the sewer system servicing the East Hill Court residents. Halton's suggestion that the sanitary sewers were the source of odours detected by the East Hill Court residents is speculative and lacks a factual foundation.

[45] Halton suggested that a company called Malecki Drum might be a source of the odour problems because it discharges forty-two tonnes of volatile organic compounds ("VOC"). Mr. Hagedus stated that odour complaints received when the wind was from the north and from the east must originate from sources other than Halton. The description of the odours identified by the residents was different than the odours from the solvents. I accept the uncontradicted and unchallenged evidence of Mr. Malecki that the solvents have a peppermint, spearmint or perfume smell. It was his evidence that the emissions from Malecki Drum were not a rotting or garbage type smell. I reject the suggestion that Malecki Drum was a source of the odour complaints.

[46] Sgt. Penny was cross-examined on July 16, 2006. He agreed that odours continued to occur but the frequency of complaints decreased. It was his evidence that there were 151 complaints between November 1, 2005 and June 9, 2006. He was a complainant on seven occasions. Sgt. Penny was unable to comment on the complaints during the spring of 2006 because he was posted out of the detachment during this period.

[47] Mr. Kamin stated in cross-examination that the frequency of complaints decreased since Halton stopped processing leaf and yard wastes. He estimated that the days when it was unpleasant to work had decreased from eight or nine days per month to three or four days per month. He said that the intensity of the odours has not decreased. In re-examination he said when odours were bad, he went onto the balcony because the odours lingered in the building. He said the odours caused dry heaves, nausea, sore throat and irritated eyes and created stress and difficulty in the workplace. He said that the longer the odour problem went unabated the less likely he and his colleagues would report a complaint because prior complaints had not been effective in stopping the odours.

[48] Ms. Owens was cross-examined with respect to the frequency of complaints. She acknowledged that she made forty odour complaints for the period November 2004 to October 2005 and thirteen complaints for the period November 2005 to June 2006. Ms. Owen said that one or two transitory releases per year would be acceptable but odours permeating her home and causing loss of enjoyment of her property were unacceptable.

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[49] Mr. McEwin was cross-examined as to the frequency of his complaints. He made forty-five complaints during a nine-month period ending in September 2005 and eleven complaints in a nine-month period ending in June 2006. He explained he was away for five weeks during the spring of 2006.

[50] Ms. Weiman was also cross-examined about the frequency of odour complaints. She made thirteen complaints during an eight-month period ending November 2005 and made three complaints for the eight-month period ending June 2006. Ms. Weiman, in her affidavit sworn on June 19, 2006, said that she had detected odours on other days but did not report them because she was frustrated that the odour problem was continuing.

[51] Mr. Hagedus was responsible for tracking and investigating complaints related to odours. He and other Halton employees attempted to verify complaints. He said that the RCMP detachment and the East Hill Court residents were, and continued to be, the main source of complaints. It was his evidence that the frequency of complaints was trending downward. Mr. Hagedus referred to the month of June 2006 to demonstrate that the number of complaints was decreasing.

[52] There were eighteen complaints for seven days in relation to seven specific incidents for the month of June 2006. The data for June 2006 shows there were fewer complaints on fewer days in June 2006 than the fall of 2005. In September 2005 there were approximately 150 complaints on nineteen separate days with respect to twenty-three incidents. The records for the months of October, November and December 2004 and for the months of January and March 2005 show there were a maximum of seven days on which complaints were received and fewer incidents were reported in these months than in June 2006. As recently as April 2006, there were twenty-nine complaints on nine days with respect to eleven incidents. In May 2006, there were seventy-one complaints on thirteen days with respect to nineteen incidents. There were fewer complaints in the spring of 2006 than the peak period of 2005 but the complaints received in the months of April, May and June 2006 were comparable to data reported for the period just after the start-up by Halton and prior to the implementation of the remediation program, notwithstanding Halton did not process leaf waste and operated at 15% capacity by reason of a MoE order during the recent period.

(b) The Source and Impact of the Odours

[53] I have considered Mr. Hagedus's evidence that some complaints were investigated but not verified. Also, there were complaints that were inconsistent with the direction of the wind as recorded by the anemometer. Mr. Hagedus agreed, however, that Halton received notice of some complaints after the fact and as a result Halton was unable to investigate the validity of these complaints and that Halton did not attempt to verify all complaints. There was evidence that buildings could affect anemometer readings and there were conflicting opinions about the accuracy of the anemometer and the usefulness of a flag as an indicator of the direction of the wind.

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[54] There were suggestions that the residents were sensitized to believe all odours originated from Halton without investigation. There were suggestions that Halton employees did not detect odours in the presence of others who did. I am also aware that some odours may dissipate quickly and other odours become embedded in clothing and cars or get recycled by HVAC at the RCMP premises. Direction and wind speed are also important factors in determining the location and impact of odours.

[55] I have considered all this evidence and make the following findings. The RCMP and the Town's odour tracking systems reported with a high degree of accuracy the identity of the complainants, the time and date of the complaints and the location of the complaints. The evidence established that the odours being discharged from Halton's processes were distinctive. Halton verified a number of these complaints, albeit there were differences of opinion as to the intensity of the odours.

[56] Halton conceded that it has and will continue to have an odour problem until its remedial plan is completed. I reject the suggestion that the Malecki Drum, JB Printing or the Town's sanitary sewers were the cause of the odours that were the subject of the complaints by the affiants. There is compelling evidence that Halton was the source for most of the odour complaints identified by the affiants commencing from July 28, 2004 to the date of the hearing.

[57] I accept the characterization of the odours from Halton and their intensity as described by the residents, members of the RCMP and its employees, the mail carrier and the other individuals who work in nearby office and commercial establishments.

[58] Halton's odours were distinctive as confirmed by a site visit by a MoE provincial officer during his November 18, 2004 site visit. The officer detected an odour while driving on highway 404 just northeast of the site, which he described as "a very strong feces-like odour." In his report, the officer stated that it was the same odour that he had detected at the Halton facility on November 15, 2004. The officer subsequently detected the same feces-like odour in the RCMP parking lot. He attended at the Halton facility where he detected the same feces-like odour that he had smelled an hour earlier while driving on highway 404.

[59] The affiants who swore their affidavits in November 2005 were not cross-examined. Their unchallenged evidence corroborated the evidence of the individuals who swore supplemental affidavits in 2006. I conclude that the odours being discharged from Halton's facility are strong and have a pungent feces-like smell or a rotten garbage smell as more fully described above in paragraphs 22-36.

[60] I accept the evidence of the residents, the RCMP officers, the mail carrier and the individuals who work in nearby premises concerning the impact that the odours had on them and their family members. I also accept their evidence as to how the odours impacted the workplace and interfered with the residents' ability to use and enjoy their property. I conclude that the residents and individuals living and working within the zone of influence (as identified on the base map exhibit 2 B) have been adversely affected by the odorous emissions from Halton's facility. I find that the emissions from the

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Halton waste processing facility caused a loss of comfort and convenience to individuals living and working in the vicinity of Halton.

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(c) The Ryan v Victoria Factors

[61] In *Ryan v Victoria (City)* [1999] 1 S.C.R. 201, the Supreme Court of Canada defined a public nuisance and the factors that may be considered in determining whether or not a particular activity constituted a public nuisance. The Court stated:

> The doctrine of public nuisance appears as a poorly understood area of law. "A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience."… Essentially, "[t]he conduct complained of must amount to… an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference.
>
> Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood

[62] I accepted above the evidence of the complainants that the organic waste processing facility caused an inconvenience to the individuals who lived and worked in the vicinity of Halton's facility. I will now consider the other factors identified by the Supreme Court, namely, the difficulty in lessening or avoiding the risk, the utility of the activity, the general practice of others, the character of the neighbourhood, and the inconvenience caused by the activity.

(i) *The difficulty in lessening or avoiding the risk*

[63] Ms. Leung, the founder and Chief Executive Officer of Halton, identified a number of improvements (paragraphs 60-67 of her affidavit) that Halton plans to complete to reduce or eliminate the odour problem. Mr. Piersol said that Halton made a commitment to fully implement its remedial action program. He said that its implementation would reduce the odours to one odour unit as required by condition two of Halton's certificate of approval (air). I find that Halton can lessen and reduce the risk of causing a nuisance by installing equipment and making the improvements recommended by Mr. Piersol and described by Ms. Leung.

(ii) *The utility of the activity*

[64] There is no dispute that the diversion of SOS from landfills and converting it to useful compost is an important environmental objective and a societal benefit.

(iii) *The general practice of others*

[65] Mr. McAree, counsel for the Town, submitted that Halton did not adduce any evidence of general practice. I disagree. There is some evidence of the practice of other waste processing facilities in the reports submitted to the Town by its consultants CH2HILL. CH2HILL prepared two reports concerning Halton's processing facility and its operation. In the consultants' initial report entitled "Due Diligence Review," dated August 19, 2004, the consultants listed eighteen proactive measures that Halton has implemented or intended to implement. One of the report's conclusions was that "…the equipment and systems installed in this facility are within, if not exceed, industry standards for odour management." In the second report, entitled "Interim Review of Operations" dated February 3, 2005, the consultants were unable to provide an opinion on Halton's remedial action plan because the plan was incomplete at the time of their review. Mr. Piersol's opinion was that upon completion of the remedial action plan, the facility would significantly reduce its emissions and Halton will be in compliance with condition two of its certificate of approval, namely the one unit of odour emission requirement. I conclude that Halton currently does not meet the standard set by the regulatory authority (MoE). I find that Halton falls below the industry standard for processing facilities by reason of its failure to comply with its operating certificate of approval in respect of odour emissions from July 2004 to the present.

(iv) *The character of the neighbourhood*

[66] The site is zoned M3 industrial. However, the RCMP building 200 metres to the north is an office building. Other identified uses are York Region School Board and CCI and a book warehouse. Thus, the actual use is a mixed-use, office, commercial, and industrial. There is also a residential use within the zone of impact of the odours.

(d) Conclusion

[67] Mr. Crocker, counsel for Halton, submitted that the odour emissions could constitute a private nuisance but they did not constitute a public nuisance. Professor Klar in his text (Tort Law (3rd ed. at p. 642 and 643) states that "Whether enough members of the public were detrimentally affected by nuisance in order to constitute the activity as a public nuisance is a question of fact." He cites a judicial test which provides: "that so long as the activity interfered with the comfort and convenience of life of the persons residing in or coming within the sphere of influence of that which has been done by the defendants as their works." He also cited Lord Denning's test that "a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it."

[68] I find that the operation of Halton's waste processing facility unreasonably interfered and continues to interfere with the comfort and convenience of persons working or residing within its sphere of influence. The degree of discomfort and inconvenience varies depending on the intensity and duration of the odours, the atmospheric conditions and individual sensitivity. The number of complaints graphically demonstrates the emissions' sphere of influence and their location as indicated on the base map (exhibit 6B). The evidence is that the comfort and convenience of individuals who

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work or live in the vicinity of Halton were and continue to be adversely affected whenever there are emissions from one or more sources of odour under Halton's control especially if there are calm winds or winds from the south or southeast.

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[69] The municipality and the RCMP expended considerable resources recording and tracking the odour complaints. In addition, the Town expended resources attempting to verify the source of the complaints and eliminating other potential sources. The time and resources required to investigate and initiate this proceeding are far beyond the physical and financial resources of most individuals. Applying Lord Denning's pragmatic approach, the effect of the offensive emissions was widespread and indiscriminate in its effect. I find it would be unreasonable to expect an individual to initiate an action for nuisance to stop the odorous emissions.

[70] I find that the effect of the odour emissions was widespread within Halton's sphere of influence and sphere of activity, that is, within a 1200 to 1800 metre zone of Halton's facility. These emissions were and continue to be "an attack upon the rights of the public generally to live their lives unaffected by inconvenience and discomfort." I find that Halton's activities affect a significant number of persons who live and work in the vicinity of Halton and constitute a public nuisance.

[71] Halton submitted that the court should decide the issue of public nuisance on the basis of the reduced number of complaints in the month of June 2006 or alternatively on the recent downward trend of complaints. Mr. Crocker argued that the evidence of complaints set out in the affidavits sworn on November 25, 2005 were irrelevant because the odours were not a public nuisance at the time of the hearing.

[72] I will assume for the purpose of Mr. Crocker's argument that there was a downward trend in the frequency of complaints on the basis that the starting point for the determination of the trend is the peak period of complaints in 2005. But, as pointed out above, there were a significant number of odour incidents in April and May 2006. The frequency of complaints for one month is not determinative as to whether or not the activity constitutes a public nuisance. The nuisance is a continuing one and the downward trend is a piece of evidence in the context of events over the two-year period since Halton commenced operating the plant. The trend, however, does not render the evidence of the affiants describing events prior to November 2005 irrelevant. In my view, the subject nuisance is properly considered a continuing nuisance that commenced on July 28, 2004 when the first complaint was made and continues to the present.

[73] In *Appleby v. Erie Tobacco Co.*, (1910) 22 O.L.R. 533, the Divisional Court held that an "extremely disagreeable" offensive odour constituted a nuisance. More recently, in *Atwell v. Knight* [1967] 1 O.R. 419 (H.C.J.), Stewart J. found that a powerful and obnoxious smell from hen houses constituted a nuisance. Morden J. (as he then was) found that relatively infrequent smells that did not significantly contribute to existing feelings of discomfort of the plaintiff did not constitute a nuisance (*Walker et al v. Pioneer Construction* Co. (1967) Ltd. (1975), 8 O.R. (2d) 35 (H.C.J.)). In the *Canadian Law of Tort*, Allen M. Linden (7th ed.) at 518 writes: "Nuisance law – in its public and

private forms – now covers a wide range of objectionable activities, such as noise, vibrations, noxious odours, air and water pollution."

[74] I find that the emissions emanating from the Halton processes at its premises in the Town of Newmarket are neither minimal nor infrequent. Although the odours vary in intensity, the odours were properly characterized as offensive, putrid and noxious. The odours caused a loss of convenience and comfort to a significant segment of persons who lived and worked within the sphere of Halton's emissions. The losses of comfort and convenience were neither trivial nor transitory and affected a number of persons in the vicinity of Halton's facility. Although the odours were not toxic, based on the evidence before the court, they affected the physical wellbeing of some of the residents and individuals who work in the area and caused stress to the adjacent neighbourhood and workplace alike.

[75] I find on a balance of probabilities that the emissions emanating from the Halton processes cause an unreasonable interference with the use and enjoyment of property and in the workplace for those individuals who live and work in the concentric sphere (exhibit 2 B) around the Halton facility. I find on a balance of probabilities that the processing activities on or at the Halton premises and its fugitive emissions constitute a public nuisance in the vicinity of the premises for the purposes of section 433 of the *Municipal Act*. I find on a balance of probabilities that the public nuisance has a detrimental impact on the use and enjoyment of property in the vicinity of the premises.

VII THE SCOPE OF SECTION 433

[76] Sub-section 433(b) of the Municipal Act states as follows :

> (b) the public nuisance has a detrimental impact on the use and enjoyment of property in the vicinity of the premises including, but not limited to, impacts such as,
>
> (i) trespass on property,
> (ii) interference with the use of highways and other public places,
> (iii) an increase in garbage, noise or traffic or the creation of unusual traffic patterns,
> (iv) activities that have a significant impact on property values,
> (v) an increase in harassment or intimidation, or
> (vi) the presence of graffiti;

(a) The Issue

The issue is whether odours are a type of public nuisance that falls within the ambit of s. 433 because sub-section 433(b) does not specifically list odours as a public nuisance.

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(b) The Position of the Parties

[77] Halton submitted that odours do not fall within the ambit of s. 433. Mr. Crocker submitted that the release of odours did not fit into any of the enumerated categories listed under s. 433. He refers to the requirement for the consent of the chief of police and suggested the section is designed for traffic or like matters. He submitted that the section did not include nuisances that fall under the mandate of the MoE pursuant to the *Environmental Protection Act* (R.S.O. 1990 Chapter E.19) or the *Ontario Water Resources Act* (R.S.O. 1990, c.O.40). He argued that the MoE issued two certificates of approval regulating Halton's activities and that the court should dismiss the application and allow the MoE to carry on with its statutory duties.

[78] The Town submitted that the enumerated list of the types of public nuisances is not exhaustive and the legislature intended to grant power to municipalities to close other types of nuisances. He argued that the municipality could exercise its power whether or not the MoE has acted and the fact that the Attorney General has not sought an injunction should not oust the jurisdiction of the courts.

(c) A Purposive Interpretation

[79] The *Municipal Act*, 2001 received royal assent on December 12, 2001 and came into force on January 1, 2003. The *Act* represents a significant change from its predecessor (*Municipal Act*, R.S.O. 1990, c.M.45). In *Croplife Canada v Toronto (City)*, ((2005), 75 O.R. (3d) 357, at para. 6), the Ontario Court of Appeal commented on the purpose of the recently enacted *Municipal Act.* Feldman J.A. stated:

> The *Municipal Act*, 2001 received royal assent on December 12, 2001 and came into force January 1, 2003. It was the first overhaul of the old Act and its predecessors in 150 years. The purpose of creating a new Act was to give municipalities "the tools they need to tackle the challenges of governing in the 21st century" (Ontario Legislative Assembly, Official Report of Debates (Hansard), 53 (18 October 2001) at 1350 (Hon. Chris Hodgson)), including more authority, accountability and flexibility so that municipal governments would be able to deliver services as they saw fit.

[80] The Court of Appeal stated that it would be a retrograde step to restrictively interpret the powers of municipalities under the new *Act*. Feldman J.A. adopted the reasoning of McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1964] 1 S.C.R. 231, at p. 244:

> Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where the powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent approach"… and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives (ibid., at paras. 16-18).

Feldman J.A. held that a broad and purposive approach should be used to interpret the powers granted to the municipalities under the new *Act*.

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[81] The role of the Attorney General to enjoin public nuisances in the public interest is of great antiquity. Legislators, however, have created specific statutory authorization for Ministers, or others, to seek injunctive relief on grounds of the public interest, such as under s. 39 *Canadian Environmental Protection Act* and s. 29 *Ontario Water Resources Act* R.S.O. 1990, c. 0.40 (see Robert J. Sharpe, *Injunctions and Specific Performance*, (Aurora: Canada Law Book, Nov. 2005), at paras. 3.70, 3.265). The Ontario Legislature gave municipalities the ability to apply to the Superior Court for an order to close premises within the municipality on the ground that activities were causing a public nuisance. The Attorney General, however, retains its authority over an application for closure because it can prevent an application (s. 433(4)), take over or terminate an application, or appear on the application (s. 433(5)). The Attorney General retains its jurisdiction to seek injunctions to prohibit an activity causing a public nuisance (s. 433(15)).

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[82] Municipalities have the power to enact by-laws to prohibit and regulate public nuisances, including matters that are or could become or cause a public nuisance (*Municipal Act*, s. 128 (2001, c. 25, s.128 (1)). Thus, s. 433 provides municipalities with another tool to control a public nuisance. If the presiding Superior Court Judge is of the opinion that the municipality is acting beyond its powers, she or he will dismiss the application.

[83] The enumerated list illustrates the types of subject matter encompassed by the general terms (*Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403). Another purpose of providing specific examples from within a broad category is to remove any ambiguity as to whether those examples are included in the category (*National Bank of Greece (Canada) v Katsikonouris* (1990) 74 D.L.R. (4th) 197 (S.C.C.) per LaForest J.). A commentator on the new amendments states that the types of activities enumerated in subsection 433(b) ensure that the legislation is in compliance with the provincial constitutional authority to regulate "property and civil rights" and does not infringe federal constitutional powers with respect to morality and criminal law (George Rust-D'Eye & Ophir Bar-Moshe, *The Ontario Municipal Act: A User's Manual – 2006* (Toronto: Carswell, 2006) at p. 572).

[84] The new *Act* allows the municipality to make an application to close premises if activities on or in the premises cause a public nuisance; however, the municipality must first obtain the consent of the chief of police. This requirement does not limit the types of activities or the kinds of public nuisances covered by s.433. This provision allows the chief of police to refuse to consent only where the application may have an impact on the operations of the police, for example, the application interferes with a police investigation or an order of closure requires the assistance of the police (see s. 433(9)).

[85] I find that s. 433 should not be restrictively interpreted to limit relief to the enumerated categories of public nuisances. I find that the purpose of the words "including, but not limited to, impacts such as" enlarges the meaning of the general terms "public nuisance" and "impacts" and do not limit the preceding words. I find that the enumerated list in s. 433(2) does not preclude an order of closure of premises for a public nuisance caused by odours.

(d) Overlapping Jurisdictions

[86] I will now address Halton's argument that s. 433 should not be applied in the subject circumstances because the MoE has the statutory authority to regulate the activity causing the alleged nuisance. The Supreme Court considered the problem of conflicting jurisdictions in Quebec in *114957 Canada v. Hudson (Ville)* (2001) 2 S.C.R. 241 [Spraytech] at para. 38-39:

> The court summarized the applicable standard as follows: "A true and outright conflict can only be said to arise when one enactment compels what the other forbids." … "Compliance with the provincial Act does not necessitate defiance of the municipal By-law; dual compliance is certainly possible."; … "A finding that a municipal by-law is inconsistent with a provincial statute (or a provincial statute with a federal statute) requires, first, that they both deal with similar subject matters, and second, that obeying one necessarily means disobeying the other.
>
> As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter... [references omitted]

[87] A judicial order of closure on grounds of public nuisance pursuant to s. 433 of the *Municipal Act* does not frustrate the purpose of the *Environmental Protection Act* or preclude compliance with environmental legislation (*Croplife Canada v Toronto (City)*, *supra*, para. 63). The Ontario legislature did not intend to occupy the field of public nuisances caused by odours by enacting the *Environmental Protection Act*. If the legislature intended to exempt MoE-regulated activities from the nuisance provision of s. 433, it could have explicitly done so, as was done in regards to municipal sewage plants under s. 449(1) of the *Municipal Act* which states:

> No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,
>
> (a) a municipality or local board;
> (b) a member of a municipal council or of a local board; or
> (c) an officer, employee or agent of a municipality or local board.

[88] I find that s. 433 of the *Municipal Act* should be interpreted in a broad and purposive way to grant a municipality the authority to make an application for closure when odours cause a public nuisance.

VIII ADEQUATE STEPS TO ELIMINATE THE NUISANCE

[89] Section 433(3) requires the municipality to prove that the owner of the premises knew or ought to have known that the activities constituting the public nuisance were taking place or existed and the owner did not take adequate steps to eliminate the public nuisance. Halton submitted that it had taken adequate steps to eliminate the nuisance. The Town disagreed.

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[90] Ms. Leung, the Chief Executive Officer, and Mr. Hagedus, the compliance officer, knew that there were odorous emissions from the Halton facility. Members of the public, Town by-law officers and provincial officers told Mr. Hagedus and other employees about the emission of offensive odours which they believed originated from Halton's organic waste processing facility. Mr. Hagedus recorded these complaints and instituted a program to verify them. Ms. Corrigan also sent copies of complaints received by the Town's odour complaint tracking system to Mr. Hagedus.

[91] Ms. Leung has been involved in the waste diversion and recycling industry since 1976. She founded Halton in 1995 and purchased the Newmarket facility from CCI in November 2003. Ms. Leung was aware that changes were required to minimize the emission of off-property odours. Ms. Leung stated that the processes emit odours typical of decomposing food waste.

[92] I find on a balance of probabilities that Halton knew that the storage and processing of organic wastes caused odorous emissions.

[93] The issue is whether the company took adequate steps to eliminate the odorous emissions. Halton purchased the facility from CCI in November 2003. Halton learned during the due diligence period that there were offensive odour emissions while CCI was operating the facilities and there were numerous complaints. Thus, the company knew it needed to rectify the odour problem prior to purchasing the facility.

[94] Ms. Leung described in detail the changes Halton made to the plant, equipment and processes to reduce the odour emissions. She provided a detailed description of additional measures that needed completion to reduce emissions. Mr. Piersol, Halton's environmental consultant, agreed in cross-examination that some fugitive odours are currently not under control.

[95] Halton spent $7.0 million to upgrade the plant and equipment before it started processing organic wastes. Halton subsequently spent approximately $1.0 million to reduce its odorous emissions. Halton estimated that an additional $1.0 million would be required to complete the remedial action plan. Halton purchased some equipment as part of its program. Halton requires approval from the MoE to install this equipment and construct structures. On May 8, 2006, Halton applied to the MoE for approval for the remaining remedial measures but to date it has not received a certificate of approval. Halton also requires an approval from the Town to construct structures. Mr. Tremblay said that the Town processed Halton's application and the documentation is awaiting Halton's signature.

[96] Halton commenced processing organic wastes on July 24, 2004. The first complaint was received four days later on July 28, 2004. There have been continuous complaints since July 2004, albeit the number and the frequency of complaints varied from month to month. Also, the intensity of the offensive odours and their impact in the vicinity of the facility varied depending on many factors, including: the processes, operation of the equipment, fugitive emissions and wind direction and velocity.

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[97] Halton made a large number of improvements to its plant and equipment and made process and operational changes to reduce emissions. Halton initially operated under CCI's certificate of approval. Halton applied to the MoE for amendments to the original certificate of approval pursuant to s. 9 of the *Environmental Protection Act* in order to make changes to the facilities. The MoE revoked the original certificate of approval and replaced it with a new certificate of approval dated September 15, 2004.

[98] Condition 8 of the air certificate of approval required the company to perform source testing to determine the rates of emission of odour and sulphur compounds from the treatment process and to quantify fugitive omissions. The purpose of source testing is to identify the source of the odour as a first step to reduce or eliminate emissions. The company was required to submit the test protocol within three months of the issuance of the certificate (September 15, 2004) and to complete the source testing and the fugitive emissions measurements within three months of MoE acceptance of the test protocol.

[99] Halton knew it had odour problems before it purchased the facility. Halton received numerous odour complaints from the RCMP, the residents living on East Hill Court and other individuals. Halton knew it was not in compliance with condition 8 (source testing) of its air certificate of approval.

[100] Mr. Piersol of Ortech Environmental was not retained to devise a plan for the source testing and to conduct a community odour survey to measure ambient odours in the community until the spring of 2005. The latter test would determine if the company was in compliance with the odour limit prescribed by condition 2 of its certificate of approval. The source testing protocol was not submitted to the MoE until June 2005. The source testing was not performed until August 2005, approximately eleven months after the certificate of approval was issued. The MoE also identified deficiencies in Halton's maintenance and operating procedures during the same time period.

[101] Condition 2 of the air certificate of approval stipulates that the company shall operate and maintain the facility so that the maximum ten-minute average concentration of odour measured at the most impacted sensitive receptors (residences, commercial and office buildings) so that the emissions, including fugitive emissions, shall not be greater than a 1.0 odour unit under all atmospheric conditions.

[102] The community ambient air survey was conducted by Ortech at the RCMP building and at the East Hill Court residential area in August-September 2005. Mr. Piersol confirmed in cross-examination that Halton's emissions did not comply with condition 2 of the air certificate.

[103] On December 15, 2004, a MoE provincial officer informed Halton that it must immediately take steps to develop an abatement plan to eliminate off-site odours. In September to October 2005, Mr. Piersol prepared a remedial action program to address Halton's emissions. A Provincial Officer's order, dated October 7, 2005, required Halton to provide a remedial action plan to identify the sources

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of odour problems, the steps to investigate them and the steps to implement remedial measures. Mr. Piersol agreed in cross-examination that Halton would not meet the threshold of condition 2 until the remedial action program was completed.

[104] As noted, Halton has taken remedial measures since September 2005. Mr. Piersol's preliminary evaluation indicates an 80% odour reduction since September 2005 (when the remedial plan commenced) and July 2006. Mr. Piersol estimated that 20% of the program remains to be completed. Although Halton knew it had a significant odour emission problem it did not commence its remediation program until approximately fourteen months after it commenced its operations.

[105] Halton did not perform the source testing to determine the emission rates for odour and sulphur compounds and did not submit a test protocol for fugitive odour emissions as required under conditions 8 and 10 of its certificate of approval in a timely manner. Halton did not take remedial steps in a timely manner when it knew or ought to have known that its emissions exceeded the 1.0 odour limit under all atmospheric conditions as required by condition 2. Halton also defaulted under the site plan agreement. Halton did not prepare and implement a remedial action program until September – October 2005 more than one year after it commenced operations. I find on a balance of probabilities that Halton did not take necessary steps in a timely manner to eliminate the offensive odours that caused the public nuisance.

IX THE DISCRETIONARY ORDER FOR CLOSURE

(a) Position of the Parties

[106] The Town seeks a two-year or, alternatively, a one-year closure order to allow Halton sufficient time to eliminate its odour emissions. Counsel submitted that Halton may apply to the Superior Court to suspend an order of closure for such period and upon conditions or Halton may apply to the Court for an order to discharge the order pursuant to ss. 433 (7) and (8) after the emissions are eliminated. The Town seeks several declaratory orders.

[107] Halton submitted that the application should be dismissed because the Town has failed to prove the statutory requirements for an order of closure. In the alternative, Halton submits that the application should be dismissed or adjourned on conditions to allow Halton an opportunity to complete its remedial action program. Halton agrees to maintain its production at MoE approved levels and disclose information to the Town concerning the progress of the remedial action program.

[108] I invited counsel to consider alternative positions. The Town proposed a closure order on terms (exhibit 8C) together with a detailed plan requiring Halton to install equipment, conduct tests and report to the Town and other requirements. This proposal is similar to an order issued by a Director under the *Environmental Protection Act*. Halton submitted that the application should be dismissed or adjourned on specified terms during and after the implementation of the remedial action

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plan such as conducting tests to determine compliance. Under the Town's proposal, the Town becomes a quasi-regulator in addition to the MoE. Halton's proposal, on the other hand, is a continuation of the status quo together with disclosure and a review of Halton's emission program.

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(b) Decision

[109] Leaving aside jurisdictional problems with the alternative proposals, they would likely require future judicial intervention or supervision. Courts do not have the ability or expertise to supervise the performance of ongoing complex technical matters and it is not the function of the courts to become the regulator (Robert Sharpe, *supra*, at paras. 1.260, 1.270). Accordingly, I do not accept these alternative submissions. The Town's request for declaratory relief is dismissed because the relief was not requested in its application.

[110] I found that the statutory criteria set out in s.433 of the *Municipal Act* have been satisfied to a balance of probabilities for reasons set out above. The Superior Court, however, has a discretion not to grant injunctive relief even though the criteria have been satisfied.

[111] Halton is in the recycling business and it is in the public interest that organic waste be processed into compost. I am aware that the conversion process depends upon a biological process and a prohibition order will necessitate re-starting the biological process after the order terminates. Halton implemented changes to its processes and installed new equipment to reduce the offensive emissions but I am not satisfied that Halton took all necessary steps in a timely manner to eliminate the nuisance. As found above, Halton's facility produces offensive emissions causing a public nuisance, albeit the current rate of emissions is less than during the peak period in 2005.

[112] The residents and persons living in the vicinity of the Halton facility have endured the offensive odours for more than two years. I have considered the frequency and intensity of the offensive odours. Although the emissions are not toxic, they have caused headaches, naseau and other health problems. The emissions have caused an adverse effect, namely the loss of enjoyment of the normal use of property and interference with the normal conduct of business. I note that the Town does not object to the existence of the facility or the recycling process but it does object to the unacceptable impacts on the quality of life of its residents and businesses. There is also evidence that other facilities are capable of processing organic waste if the Halton facility is closed.

[113] I have considered the benefit and harm of a closure order. The case law recognizes that a court may issue a conditional order or stay an order to provide the respondent an opportunity to abate the nuisance (Robert Sharpe, *supra*, at paras. 4.260- 4.330; *Walker v. Pioneer Construction* (1975), 8 O.R. (2d) 35. The expert retained by the company opined that Halton required ninety days to complete the remedial action plan and that upon its completion the emissions will meet the one unit odour limit prescribed by condition 2 of Halton's air certificate of approval. Mr. Piersol said that the odours experienced at the offices, warehouses and residences in the vicinity of Halton will be abated upon the completion of the plan. The individuals working and living in the impacted area have endured the

nuisance for a significant period and it is in the public interest that the community receive a level of comfort that the operation of the waste processing facility will not continue to cause a public nuisance.

[114] There will be a closure order restraining the respondent Halton, its servants and agents, from operating the processes at their premises located at 395 Harry Walker Parkway South in the Town of Newmarket for nine months. The operation of this closure order will be stayed for ninety days from the date of the issuance of this order to enable Halton to take such steps as it sees fit to abate the public nuisance during the period when the order is stayed.

[115] Halton may apply to the Superior Court of Justice pursuant to s.433 of the *Municipal Act* to suspend this order upon satisfying the court to a balance of probabilities that the use of the premises will not result in activities or circumstances constituting a public nuisance. Halton may also apply under the *Act* to the Superior Court for an order discharging the closure order upon satisfying the court to a balance of probabilities that circumstances have changed to the extent that the premises will not be used in a manner that will result in activities and circumstances constituting a public nuisance.

[116] Halton requires a certificate of approval from the MoE to complete its remedial action plan. Halton submitted the requisite application to the MoE on May 8, 2006 but to date has not received the approval. The court was not provided with a reason for the delay because the MoE did not participate in this proceeding through the Attorney General.

[117] The stay will allow Halton a window to abate the public nuisance but it should not be perceived as condoning the public nuisance. The stay is granted on the following terms:

1. Halton is limited to the receipt and processing of source separated solids to a maximum of ten truckloads per week;

2. Halton shall operate and maintain the equipment and processes to reduce the emissions from its process and take all reasonable steps to prevent fugitive emissions during the ninety day period of the stay;

3. Halton shall immediately use its best efforts to obtain all required government approvals to implement its remedial action plan; and,

4. Halton shall construct structures and install equipment and make all necessary operational changes to fully implement the remedial action plan.

[118] I request the MoE and order the Town to process the required approvals, licences and agreements to allow Halton to complete its remedial action plan within the ninety day stay period.

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[119] I wish to thank counsel for their able assistance. The organization of documents was well done and the factums clearly set out their respective arguments. The applicant shall submit its cost submissions within ten days of the date of this order. The respondent shall have ten days to respond on or before ten days of receipt of the applicant's submission and the applicant will have thirty days to reply. The cost submissions are limited to three pages plus appendices.

"Bryant J."

Justice A. Bryant

Released: October 3, 2006

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C O R R I G E N D A

Paragraph 117 (1) now reads:

1. Halton is limited to the receipt and processing of source separated solids to a maximum of ten truckloads per week;

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TAB 12

CITATION: Lanark v. Morrow, 2011 ONSC Number 4028
COURT FILE NO.: 180/11
DATE: 2011/06/27

2011 ONSC 4028 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: County of Lanark, Applicant

AND:

Steven James Morrow and Joan Lorene Morrow, Respondents

BEFORE: Quigley J.

COUNSEL: William R. Hunter, Counsel, for the Applicant

Donald R. Good, Counsel, for the Respondents

HEARD: May 13, 2011

REASONS FOR DECISION

[1] This is an application by the County of Lanark (applicant) for a declaration, an injunction and damages relating to the respondents' deliberate blocking of a drainage ditch located on their property. It is alleged that this blockage has caused flooding on neighbouring properties and is likely to cause flooding across an adjoining county road.

Background

[2] In 1969, the applicant completed a project to improve the Christie Lake Road (the Road) through the Hamlet of Glen Tay.

[3] The work on the Road included the relocation and back-filling of an existing stream. The relocated stream is found on the property described as Part Lot 21, Concession 2, Bathurst, Part 2 and 3, Plan 27R4072 (the Morrow property).

[4] The respondents (the Morrows) acquired their property in 1994.

[5] As a result of complaints in 2010 from adjoining property owners located to the east of the Morrow property, representatives of the applicant met on June 10, 2010 with the Morrows and adjoining property owners to seek a solution to the water problem.

[6] On June 21, 2010 the applicant delivered a letter to the respondents with a draft drainage easement for execution. This easement would provide that the applicant would arrange to clean the drainage ditch, not only on the Morrow property but also on the adjoining properties to permit the natural flow of water from east to west.

[7] The respondents did not execute the drainage easement agreement, and Steven Morrow advised the applicant's representative that he intended to block the flow of water on his property.

[8] The remedial work on the adjoining properties was completed on August 25, 2010. On that same day, two County workers observed the respondent Steven Morrow constructing an earth dam in the drainage ditch between his property and the Lee property, which is the adjoining property to the east of the Morrow property.

[9] The adjoining properties flooded in March, 2011 as a result of the natural spring run-off and the fact that this run-off did not have its natural outlet in the drainage ditch.

[10] There is a concern by neighbouring landowners and the applicant that future flooding will have adverse consequences to the lands and homes of the property owners and as well will cause damage to the County road adjoining the properties.

Preliminary Objection to this Application by the Respondents

[11] The respondents assert that this originating process should not proceed as an application, but rather is one that should be commenced with a statement of claim.

[12] I disagree. Rule 14.05(3)(h) permits an application to be brought in respect of any matter where it is unlikely that there will be any material facts in dispute.

Position of the Applicant

[13] The applicant submits that the following facts are not in dispute:

1. the ditch has been on the Morrow property, draining properties from the east, since before 1969;

2. the ditch is currently clogged with cat-tails in addition to the mounds of earth placed there in 2010 by the respondent Steven Morrow;

3. the ditch on the Morrow property needs to be graded to permit a proper flow of the water;

4. the ditch has always drained land from the east to the west;

5. the work to correct the flow of water has been completed by the applicant up to the east edge of the Morrow property;

6. Steven Morrow dammed the ditch on his own property;

7. there has been a flooding on the adjoining properties in 2011;

8. a continuation of the flooding could cause damage to the substrata of the Road;

9. one of Steven Morrow's motivations in damming the ditch on his property was to enable a severance of a lot from his property.

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[14] The applicant states that as a result of these uncontested facts, the damming of the Morrow property has created a situation of public nuisance in which the applicant has been forced to act.

The Position of the Respondents

[15] Counsel for the respondents acknowledges that the current situation cannot continue, however he asserts that the respondent Steven Morrow did not capriciously block off the ditch. He contends that the respondent blocked the ditch in order to protect his property rights.

[16] The respondents also allege that this has always been a private ditch and thus presumably they are contending that any complaint must be made by adjoining property owners and not by the County.

[17] Counsel for the respondents further asserts that the status of the drainage ditch cannot be resolved short of a trial, in which the source of the water will be determined.

[18] The respondents have always been told by various municipal authorities that the ditch was a private ditch. There is no assertion by the applicant that this is in fact a public ditch.

Issues

[19] The main issue, in my view, is whether the actions taken by the respondents in damming the ditch amount to a public nuisance.

[20] A public nuisance is any activity which unreasonably interferes with the public's interests in questions of health, safety, morality, comforts or convenience. See *Ryan v. Victoria (City)* [1999] CarswellBC 79 p.19. A public nuisance is conduct which amounts to an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference. Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway.

[21] A number of factors are relevant when determining whether a particular activity is a public nuisance, including:

a. the inconvenience caused by the activity;

b. the difficulty involved in lessening or avoiding the risk associated with the activity;

c. the utility of the activity;

d. the general practice of others conducting the same activity; and

e. the character of the neighbourhood.

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[22] Whether a particular activity constitutes a public nuisance is a question of fact. "Nuisance is a tort of almost infinite variety and, broadly speaking, covers acts unwarranted by law which, in the case of public nuisance, cause inconvenience or damage to the public in the exercise of rights common to all persons. Nuisance includes the escape of water which inflicts damage, injury and inconvenience on all who come with the ambit of the nuisance." (*Torino Motors (1975) Ltd. v. Kamloops (City)* (1988), 44 C.C.L.T. 278, 1988 Carswell BC 243 (B.C.C.A.) at p. 4).

[23] In *Newmarket (Town) v. Halton Recycling Ltd.*, (2006), 25 M.P.L.R. (4th) 249, 2006 CarswellOnt 5920 at p.14, A. Bryant J. relied on excerpts from Professor Klar in Tort Law (3rd ed.) as follows:

> Whether enough members of the public were detrimentally affected by nuisance in order to constitute the activity as a public nuisance is a question of fact.

and

> ...that so long as the activity interfered with the comfort and convenience of life of the persons residing in or coming within the sphere of influence of that which has been done by the defendants as their works.

[24] The next issue to consider is whether an injunction, temporary or permanent, can be issued on the fact situation in this case.

[25] Once a nuisance is established, unless special circumstances can be demonstrated by the defendant, an injunction should issue. In *Walker v. The McKinnon Industries Limited*, [1949] O.R. 549, 1949 CarswellOnt 262 (Ont. H.C.J.) at p.3, McRuer C.J.H.C. held that:

> There remains to be discussed what form the relief should take. I had occasion to review the principles on which the Court acts in granting an injunction in cases of this sort in *McKie v. The K.V.P. Company Limited*, [1948] O.R. 398 at 416, [1948] 3 D.L.R. 201. This judgment was affirmed in the Court of Appeal in [1948] O.W.N. 812, [1949] 1 D.L.R. 39 with a slight variation in the terms of the injunction. In that case I followed the judgment of Lord Lindley in *Shelfer v. City of London Electric Lighting Company; Meux's Brewery Company v. The Same*, [1895] 1 Ch. 287 at 314 where he quoted from the judgment of Lord Kingsdown in *Imperial Gas Light and Coke Company v. Broadbent* (1859), 7 H.L. Cas. 600, 11 E.R. 239, as follows:
>
> The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation.

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[26] The Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CarswellQue 120, at p. 11, para. 40 and p. 12, para. 46, applied a three-part test in determining an application for interlocutory injunction:

a. is there a serious question to be tried;

b. will failure to grant the injunction result in irreparable harm to the applicant; and

c. does the balance of convenience favour granting the injunction.

[27] In *RJR, supra*, the Court also held that the threshold when determining if there are serious issues to be tried is a low one. A prolonged examination of the merits is neither necessary nor desirable.

[28] In this case, the issue to be tried is whether or not the respondents are committing the tort of public nuisance.

[29] When determining the issue of 'irreparable harm', Sharpe J. in *Omega Digital Data Inc. v. Airos Technology Inc.* (1996), 32 O.R. (3d) 31, 1996 CarswellOnt 5491 (Ont. C.J. (Gen.Div.)), at p.9 referred to *Evans Marshall & Co. v. Bertola S.A.*, [1973] 1 W.L.R. 349 [1973] 1 All E.R. 992 where Lord Justice Sachs asked, [I]s it just to leave the applicant to its remedy of damages in the circumstances?

[30] Irreparable harm will be suffered, not just by the applicant, but by the general public, if the injunction is not granted. Damages caused by flooding may be repaired, but the safety of individuals using the Road should not be put at risk on the basis that any damages suffered could be compensated for in damages.

[31] The balance of convenience favours granting the injunction as the applicant is acting in the interest of the general public to forestall potential irreparable harm, while no harm would come to the respondents if the injunction was granted.

[32] Fleming, Law of Torts (4th ed., 1971) at p. 346, puts it this way:

> It is not enough to ask: Is the defendant [respondent] using his property in what would be a reasonable manner if he had no neighbour? The question is, Is he using it reasonably, having regard to the fact that he has a neighbour?

Analysis and Decision

[33] I have no difficulty in finding on the affidavit evidence before me that the steps taken by Steven Morrow in 2010 in blocking the drainage ditch on his property, and the consequent flooding of adjoining properties in 2011, amount to a public nuisance. Property rights have always been sacrosanct at common law, but those rights have to be balanced against the property rights of other parties and the public interest.

[34] I find that Mr. Morrow's deliberate actions in blocking the drainage ditch have interfered with the natural flow of the water over his property which had been in effect for decades

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prior to his ownership. In this regard I note the affidavit evidence of Glen Buchanan, located at Tab 5 of the Second Supplementary Record of the applicant. Mr. Buchanan has lived on his property which is to the east of the Morrow property for 63 years. He deposed that he "has never seen flooding like there was this year". He further deposed that if the water had risen any further, "it would have been over the top of my septic bed". However, a thaw of the ice in the ditch on the Lee property on March 30, 2011 "allowed the water to flow through and across the Morrow property despite the dam".

[35] I find further that the respondents' attempt to distinguish between a private and a public ditch is irrelevant in these circumstances. The actions of the respondents in blocking the flow of water would be actionable even if there were no ditch.

[36] I also find that the applicant is entitled to a temporary injunction as a result of the actions of the respondents.

[37] Therefore, an order will go granting the applicant a temporary and a permanent injunction, prohibiting the respondents from obstructing or otherwise interfering with the drainage ditch located on the Morrow property. This injunction shall restrain the respondents from damming or otherwise obstructing the flow of water through the drainage ditch on their property. A further order will go permitting the applicant to attend on the Morrow property for the purposes of removing the obstruction and grading the ditch.

[38] A further order will go directing the respondents to pay damages up to $1,000 as claimed, to the applicant for the removal of the obstruction, provided that the applicant satisfies the respondents that the cost of removal will amount to $1,000. If there is any disagreement, counsel can submit the account to me at my Brockville chambers, within 90 days of this decision, for the purpose of assessing damages,.

[39] If the parties cannot agree on costs, written submissions not to exceed two pages in length, may be made by July 29, 2010 to me at the Brockville Court House.

THE HONOURABLE MICHAEL J. QUIGLEY

Date: June 27, 2011

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CITATION: Lanark v. Morrow, 2011 ONSC 4028
COURT FILE NO.: 180/11
DATE: June 27, 2011

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

County of Lanark

Applicant

- and –

Steven James Morrow and Joan Lorene Morrow

Respondents

REASONS FOR DECISION

Quigley, J.

Released: June 27, 2011

TAB 13

CITATION: Regional Municipality of York v. DiBlasi, 2014 ONSC 3259
NEWMARKET COURT FILE NO.: CV-13-113912-00
DATE: 20140528

2014 ONSC 3259 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
The Regional Municipality of York Plaintiff	Douglas O. Smith and Aimee Collier, for the Plaintiff
– and –	
Gaetano DiBlasi and Vito DiBlasi Defendants	Maurice J. Neirinck, for the Defendants
– and –	
Lake Simcoe Region Conservation Authority Intervenor	Kenneth C. Hill, for the Intervenor
	HEARD: December 19, 2013, February 9, April 9 and May 5, 2014

REASONS FOR JUDGMENT

GILMORE J.:

Overview

[1] This is the plaintiff's (hereinafter "the Region") motion for an interim and interlocutory mandatory order requiring the defendants to remove the berm on their property, or in the alternative, an order allowing the Region to remove the berm at the defendants' expense.

[2] The Region seeks this order by way of either, a statutory injunction, an injunction to prevent a public nuisance or an injunction pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[3] The defendants oppose the motion on the grounds that:

(a) The Region has not proven a clear breach or strong arguable case for breach of statutory duty, a public nuisance or a nuisance;

(b) A trial is needed to determine if there is a breach of statutory duty, public nuisance or nuisance; and

(c) The Region has not met the common law test for obtaining an interim injunction for the removal of the berm.

[4] An order was previously made giving the intervenor, the Lake Simcoe Region Conservation Authority (the "LSRCA"), leave to file a factum and make submissions on the motion.

[5] The subject property is located on the north side of Bloomington Road and municipally known as 1166 to 1360 Bloomington Road East, Aurora (the "defendants' property"). The property is owned by Gaetano DiBlasi ("Mr. DiBlasi"). His son, Vito DiBlasi, was the former owner of the property. The defendants' property consists of approximately 48 acres of land upon which there is a single family detached dwelling, in which Mr. DiBlasi lives. Both Bloomington Road and Leslie Street are municipal roads over which the Region has jurisdiction.

[6] The subject property runs along Bloomington Road for approximately 3,000 feet west of Leslie Street towards Bayview Avenue. Prior to August 2012 there were berms along the south side of the property in front of Bloomington Road; except for approximately 450 running west from the driveway into the commercial part of the property. Mr. DiBlasi put up a berm (the "subject berm") along the southerly edge of the said remaining 450 feet, between the berms to the west and to the east, in the area in which there was previously no berm.

[7] The ditch between Bloomington Road and the berm is owned by the Region and is approximately six feet wide.

[8] The defendants' property lies within the protected Oak Ridges Moraine Area and is subject to regulation under the *Oak Ridges Moraine Protection Act*, 2001, S.O. 2001, c. 3 (the "ORMPA") and the *Oak Ridges Moraine Conservation Plan* (Ontario Regulation 140/02) (the "ORMCP").

[9] The defendants' property also contains a provincially significant wetland ("PSW"), which is part of the White Rose – Preston Lake Wetland Complex (the "Wetland"). The Wetland has been designated as a PSW since January 2000. PSWs are areas identified as the most valuable in the province by the Ontario Ministry of Natural Resources (the "MNR") using the Ontario Wetland Evaluation System.

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[10] The Wetland, plus an area which extends outwards a distance of one hundred and twenty metres from the boundary of the Wetland ("the setback"), is regulated by the LSRCA under Ontario Regulation 179/06 made under the *Conservation Authorities Act*, R.S.O. 1990, c. C.27 (the *"Conservation Authorities Act"*).

[11] The Region is an upper tier municipal corporation headquartered in Newmarket, Ontario, and responsible for constructing, repairing and maintaining roads within its jurisdiction, including Bloomington Road. The Region has a duty imposed on it by the *Municipal Act*, 2001, S.O. 2001, c. 25 (the "*Municipal Act*, 2001") to maintain and repair Bloomington Road. It is a main arterial road near provincial highway 404. There are approximately 15,000 vehicles travelling both directions per day in the subject area of Bloomington Road.

[12] Mr. DiBlasi resides in a dwelling house located on the defendants' property and was responsible for the construction of the subject berm. Mr. DiBlasi's son was the registered owner of the defendants' property at the time the berm was constructed. Mr. DiBlasi now owns the property.

[13] The subject berm was constructed in August 2012 and is located along the southern portion of the defendants' property adjacent to Bloomington Road. It is approximately 3.5 metres high and 157 metres long. There is no dispute that Mr. DiBlasi built the berm.

[14] According to the Region, construction of the subject berm has caused pooling in the ditch between the north side of Bloomington Road and the southern boundary of the defendants' property, as well as in a ditch on the south side of Bloomington Road. This is because the subject berm has cut off the flow of the intermittent watercourse over Mr. DiBlasi's land from culvert C19 under Bloomington Road and into the Wetland.

[15] The Region has concerns with respect to standing water in the ditches weakening the pavement structure on Bloomington Road, as well as concern about flooded ditches becoming drowning hazards for motorists. Finally, the Region has public health concerns with respect to standing water being a habitat for mosquito larvae, which may carry mosquito borne diseases, such as West Nile Virus. As well, the Region has paid for water to be pumped from the north drainage ditch more than ten times since December 2012 at a cost in excess of $11,000. The Region has also documented high levels of standing water at various times in 2012 and 2013.

[16] In 2012 Mr. DiBlasi applied retroactively to the LSRCA for a permit to construct the berm. A permit was never issued to him, but the LSRCA served Vito DiBlasi with a Notice of Violation dated September 26, 2012, with respect to the unauthorized development, interference or alteration in or on a wetland setback. That prosecution is currently underway.

[17] The defendants deny that the berm prevents any intermittent watercourse from flowing from the Region's expanded ditch onto the property, nor does it trap any water in the expanded ditch. Further, the defendants deny that there has ever been such a watercourse, and that the Region is solely responsible for the inflow, accumulation and ponding of water in its own ditches, or for failing to cause the water in the ditch to flow eastwards through the ditch toward and under Leslie Street through a culvert into the Rouge River as was always intended. The

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defendants deny that the berm is within the PSW or within the 120 metre setback of the PSW. Their position is that if the berm is removed, water would continue to pond in the ditch on the north side of Bloomington Road.

[18] Mr. DiBlasi maintains that culvert C19 was not operational until after July 2012 when the Region undertook work to allow water to flow through. The Region denies this, stating the work done in July 2012 was only to remove some sediment build-up, and that culvert C19 has been in place for 35 years and was replaced with a new culvert in 1976 when Bloomington Road was widened.

[19] Whether or not the defendants had the right to construct the berm on the subject property is not in issue with respect to this motion. This motion relates to whether or not the defendants should be required to remove the berm. The defendants have failed to remove the berm and failed to comply with the Region's demands to do so.

Factual Issues

[20] There are several facts in this case that are not in dispute. There are as follows:

(a) Bloomington Road is a major arterial road under the Region's jurisdiction;

(b) Culvert C19 runs under Bloomington Road from south to north, and is a culvert which has been in place since before the defendants owned the property;

(c) The berm was built by Mr. DiBlasi or at his behest in August 2012, and the dimensions of the berm are not in dispute;

(d) There was never any flooding in the north ditch between October 1982 and August 2012. Since construction there has been pooling of water in the north ditch, with a depth of water between two and three feet at times;

(e) On a number of occasions the Region has alleviated flooding by pumping out water from the ditch;

(f) There is a wetland on the property fed, in part, by water flowing from the north drainage ditch onto the defendants' property; and

(g) Mr. DiBlasi is currently being prosecuted by the LSRCA with respect to the construction of the berm without a permit.

[21] The two main areas of contention, as between the parties, are the cause of the flooding in one or both of the ditches, and the course of the surface water and where it flowed prior to construction of the berm.

[22] The Region maintains that the cause of flooding is related solely to the construction of the berm. The defendants are adamant that the flooding has been caused from work that the Region did on one or both of the ditches in the summer of 2012.

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[23] Region staff attended at the berm on November 12, 2012, after concerns were raised by the occupants of the property adjacent to the south drainage ditch, namely Miller Waste Systems. Following this inspection by the Region a letter was sent to Mr. DiBlasi dated December 11, 2012, demanding that he remove the berm. Mr. DiBlasi refused to remove the berm. He responded to the Region by letter dated December 12, 2012, claiming that the construction of culvert C19 caused the pooling of water, and potentially contamination to the water wells on his property. He suggested that the Region construct a culvert on the south side in order to direct the contaminated water away from his property.

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Issue One – The Cause of Flooding

The Position of the Region

[24] In support of its contention that the berm is the sole cause of the flooding in the relevant ditches, the Region relies, in part, on photographic evidence provided by the Mr. DiBlasi from before the construction of the berm and photographs taken after the construction of the berm. The photos from before and after make it clear that before the berm was constructed the land sloped down from Bloomington Road and water followed the slope. After the construction of the berm the water was prevented from following the slope of the land, and it flowed back through the culvert causing flooding in both the north and south ditch.

[25] In June 2012 the Region did limited work on the south ditch to remove sediment build-up. This involved scraping out the ditch to the depth of the culvert's bottom lip. The culvert was functional and not fully occluded before this work took place.[1] The Region denies that it did any work on the north drainage ditch in July 2012 as alleged by the defendants. Further, the defendants produced photographs of work alleged to have been done on the north ditch by the Region. However, on cross-examination Mr. DiBlasi conceded the photographs could have been of the work on the south ditch. Therefore, the Region takes the position there is no evidence of any work done by the Region on the north ditch. It was never altered or expanded by them.

[26] There is no evidence that that the flooding started after the ditch work, but only after the berm was constructed in August 2012. The Region only discovered the flooding problem as a result of a complaint made in November 2012. The defendant produced a number of photographs, but none that showed flooding between the time the ditch work was done in June and the berm construction in August 2012.

[27] The Region points to a handwritten letter from Mr. DiBlasi dated December 12, 2012, contained in the Region's motion record at page 157. In the letter, Mr. DiBlasi does not deny that the berm is causing flooding. He justifies its construction and tells the Region how the flooding can be rectified without taking down the berm. Mr. DiBlasi was inconsistent with respect to his explanations for the reason why he constructed the berm. His December 12, 2012, letter indicated he was trying to keep water off the property, but in cross-examination he said he

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[1] Affidavit of Salim Alibhai sworn December 4, 2013, para. 5.

was simply finishing off the berms that were already on the perimeter of his property that had been constructed by the Region.

[28] The Region produced an expert report authored by Mr. Mark Hagesteijn, a senior associate with the engineer firm of R.V. Anderson Associates Limited, and a professional engineer specializing in the area of storm water management since 1983. He was retained by the Region to prepare a report analysing the impact of the subject berm on the existing and proposed storm drainage and in response to the report of the defendants' expert dated October 31, 2013.

[29] In his opinion, prior to the construction of the subject berm, culvert C19 drained overland via an intermittent watercourse to a wetland 100 metre north of Bloomington Road.[2] His report at page 7 indicated that pond depths in the ditch could be up to 1.88 metres, which is considered a safety hazard without having a guide rail between the pond and the edge of the road. At page 6 of the report, Mr. Hagesteijn opines that ponding will reduce the water infiltration rate. This means that the water level of the ponding is high enough that it could damage the pavement structure of Bloomington Road in this area.

[30] The Region also provided the expert report of Mr. Cameran Mirza dated April 29, 2013. Mr. Mirza is a professional engineer and the principal of Pavement Engineering with the engineering firm of Coffey Geotechnics Ltd. He has specialized in the area of pavement engineering for 40 years. His opinion is that standing water in the ditches will lower the supporting strength of the sub-base soil and weaken the pavement structure. This will cause the onset of pavement break-up which can take the form of potholes, cracking or "alligatoring."[3]

[31] The Region also notes that the LSRCA agrees that flooding is caused by the berm as per Exhibit F to the affidavit of Mr. Alibhai[4], in which Beverly Booth, manager of planning regulations and enforcement for the LSRCA in Newmarket, indicates that "[t]he fill which has been placed along the Di Blasi property boundary is currently acting as a berm and preventing waters which would normally drain into the wetland from reaching the wetland ... the blockage of normal drainage through the Di Blasi property will have an adverse impact on the wetland."

[32] As Mr. DiBlasi claims the water flowing from the Miller Paving lands is contaminated, the Region retained SPL Consultants to sample the quality of the surface water in the relevant ditches in January and May 2013. Reports dated February 13, 2013, and May 15, 2013, prepared by Gordon Jarvis, Project Manager/Senior Environmental Officer at SPL, indicate that the parameters in the surface water samples can be attributed to naturally occurring soil conditions in Ontario and pose minimal impacts to surface waters at the concentrations found.[5]

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[2] Bloomington Road Flood Analysis report prepared by Mark Hagersteijn (R.V. Anderson Associates Limited) dated December 5, 2013, page 3.
[3] Report of Cameran Mirza (Coffey Geotechnics Ltd.) dated April 29, 2013, page 3.
[4] Affidavit of Salim Alibhai sworn September 23, 2012, para. 13 - Exhibit F.
[5] Reports of Gord Jarvis dated February 13 and May 15, 2013. Exhibit AA to the affidavit of Salim Alibhai sworn September 23, 2013.

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[33] The Region is critical of the expert's report produced by the defendants. That report was prepared by Derek J. Coleman, Ph.D., an environmental planner and ecologist. Dr. Coleman has over 40 years experience in environmental, ecological and rural planning including water resource projects, waste management plans and land development. The Region does not dispute Dr. Coleman's experience or expertise, but submits it is not the right type of expertise for these issues, as a planner cannot opine on issues related to storm water management. Scientific methodology is needed, not just walking the site to see where water may have gone. The Region submits that Mr. Coleman would not be qualified as an expert at trial and that his report is simply a repackaging of the defendants' evidence.

[34] Dr. Coleman is clear that it is not the berm which has caused ponding in the north ditch but it is the Region's action in opening culvert C19 and excavating the hole the water now fills. The Region denies that it did any excavating in the north ditch and further, that culvert C19 was "opened."

[35] In summary, the position of the Region on the issue of the effect of the berm is that Mr. DiBlasi has illegally constructed a berm on his property in order to dry out the wetland and increase the marketability of the property. Despite demands by the Region to remove the berm, Mr. DiBlasi refuses to do so claiming that the ponding in the ditches is not caused by the berm but by work done on the ditches by the Region in the summer of 2012. The Region denies that any work was done on the north ditch and the work on the south ditch did not cause ponding. The berm must be removed in order to ensure that the pavement structure on Bloomington Road is not compromised by standing water, that the standing water does not become a hazard to motorists or a public health hazard from the prevalence of mosquito larvae.

The Position of LSRCA

[36] While most of the LSRCA's submissions focussed on the dispute as to whether the berm is located within their jurisdiction and the effect of the berm on the course of water to the PSWs, the position of the LSRCA on the issue of what caused the flooding aligns with that of the Region with respect to the berm preventing the drainage of waters to the PSW.

The Position of Mr. DiBlasi

[37] Mr. DiBlasi takes the position that there had never been overflow of water in previous years and that the overflow of water was caused by the work done by the Region to open up culvert C19 and deepen and widen the culvert on the south and north side. The ditch around culvert C19 was deepened to 3 feet and 100 feet long. This created a man-made pond from which water could not flow. Mr. DiBlasi relies on the work order of the Region in relation to the ditch, which is located in the Region's supplementary motion record at page 5. The action required is noted as "unplug culvert". His view is that prior to the deepening and widening of the ditch by the Region in July 2012 this culvert was "invisible and must have been covered up and underground."[6] The Region also deepened and widened the ditch on the north side at the

[6] Affidavit of Gaetano DiBlasi sworn November 25, 2013, para. 14(b).

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same time as the work was done on the south side (the Region categorically denies this). As a result of this work, Mr. DiBlasi had no choice but to build the berm so water would not flow onto his land as a result of the work done by the Region. Mr. DiBlasi's affidavit evidence was that there was no ponding in the north side ditch between 1982 and July 2012 when the work was done by the Region. Although water did accumulate in the north ditch after heavy rain, the ditch did not overflow and water flowed east in the ditch towards Leslie Street. The photographs at Tab E of Mr. DiBlasi's responding motion record showed water accumulation in the north ditch in May 2007. This ponding occurred before the berm was constructed. The photographs at Tab D were also taken in May 2007, and show ponding on the south side ditch well prior to when the berm was constructed.

[38] Mr. DiBlasi also points out that there is no evidence of the depth of the ditch on the north side before the berm went up, nor is there evidence of any measurement of the depth of the ditch after the berm was constructed. The Region's expert engineer was retained in December 2012, but never took any measurements, although he had ample opportunity to do so during 2013 before his report was published.

[39] Mr. DiBlasi's view is that even if the berm is removed, water would still pond in the north ditch. The water has nowhere to go as the northerly lip of the ditch is at least three feet above the highest water level.

[40] In 2008 the Region expropriated 39 feet of Mr. DiBlasi's land to expand Bloomington Road. The former southerly edge of his land was moved north by 39 feet. There is, however, no elevation line to show what the elevation was for his lands in 2008, nor for the elevation of the lands post-expropriation but prior to the construction of the berm. Mr. DiBlasi submits that a trial would require that surveys be done for elevation lines prior to and after the expropriation, but before the berm was constructed. Topographical surveys pre-2008 and post-2008, but prior to the construction of the berm, would be required to determine the proper elevation lines. This would bring clarity to the issue of the level of Mr. DiBlasi's lands when the berm was constructed in 2012, and the depth of the ditch. The Region should have provided that material but did not. With respect to any concerns in relation to ponding, Mr. DiBlasi submits that there is evidence of only 4 days of high volumes of water, and 11 days in which the Region pumped water from the ditch.

[41] The consequence of the Region deepening and widening the south side ditch is that they created a new situation in which water flows from the south side to the north side and then onto Mr. DiBlasi's land. The Region caused more water to come onto Mr. DiBlasi's land and he had no choice but to construct the berm.

[42] According to Mr. DiBlasi, any pumping of water done by the Region is solely as a result of their own actions in deepening and widening the south and north ditches. Further, there is no evidence that water in the north ditch has affected the pavement structure of Bloomington Road. In any event, if such damage has or does occur, it is solely as a result of the Region's own actions.

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[43] The Region did not serve its material in this matter until September 2013; over a year after the berm was constructed and including a spring and summer of wet weather. There is clearly no urgency to this matter.

[44] The Region has allowed the pooling of water in at least six other areas along Bloomington Road which are as serious, or more serious, than the ponding in question. In some cases, this ponding has been caused by the Region and they have taken no action.

[45] As for Mr. Mizra's report, the defendants' view is that it is of minimal value in that it does not identify any damage to Bloomington Road, it is theoretical as to what might occur in future and it does not opine on the reason for the ponding.

[46] With respect to water quality in the ditch, the SPL report confirms some contamination in the surface water in the north ditch. No follow up or testing has been done with respect to this finding, nor has the Region attempted to find the source of the contamination.

[47] Mr. DiBlasi's expert, Dr. Coleman, is clear that the ponding was caused by the Region's actions in opening culvert C19 and excavating the north ditch. Dr. Coleman suggests that the Region could alleviate the problem by excavating the ditch further east to Leslie Street and restore the former flow of water.

[48] In summary, Mr. DiBlasi's position on this issue is that the berm did not cause and has nothing to do with the ponding of water in the north ditch since August 2012. It was the Region's so-called "preventative maintenance work" on the ditch by widening and deepening the ditch, and opening culvert C19 which caused excessive water flow, such that the berm was required. As the construction of the berm was required because of the Region's actions, any resulting damage to the pavement or requirement for pumping the ditch are the sole the responsibility of the Region.

Issue Two – Is the Berm Affecting the Flow of Water to the PSW?

[49] At issue is the flow of water overland when it rains and the ditch fills with water; and whether the berm is located within the 120 metre setback of the PSW.

The Position of the Region

[50] The Region retained Mr. Mark Hagesteijn to prepare a report. The expert's report provides an opinion regarding the pre-berm flow of water as per the aerial photograph located at Tab 4 of the compendium of photographs and figures. This shows that prior to the construction of the berm water flowed from the south side of Bloomington Road, through culvert C19, and then across Mr. DiBlasi's property into the Wetland. The expert calls the flow of water overland an intermittent watercourse. The watercourse is only present during times when rain results in the flow of water overland. The aerial photograph also shows a brown area, which is consistent with water draining over that part of Mr. DiBlasi's property.

[51] The Region takes the position that the evidence is clear that prior to the construction of the berm water flowed exactly as per Mr. Hagesteijn's report, through the culvert, along the

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ditches and into Mr. DiBlasi's land as a sheet, and then more narrowly to the Wetlands. This is shown succinctly at Tab 10 of the compendium, which specifically notes a drainage course on a topographical map prepared by Delph & Jenkins Limited dated January 18, 2000. The drainage course is noted in the exact position which Mr. Hagesteijn says is the intermittent watercourse.

[52] There is no issue with respect to the berm being within the setback of the PSW. The aerial photograph at Tab 5 of the compendium when viewed in conjunction with Tab 2G of the Region's motion record make it clear that the berm is within the red-circled setback area.

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The Position of the LSRCA

[53] Mr. Hill, on behalf of the LSRCA, advised that the subject property contains wetland which is provincially significant. He pointed to a map located in the motion record of the Region at Tab G, which shows the boundaries of the jurisdiction of the conservation authority.

[54] Provincially significant wetlands are areas identified by the province as being the most valuable based on a science based ranking system known as the Ontario Wetland Evaluation System. The information is provided to planning authorities to support the land use planning process. Wetlands are among the most productive and biologically diverse habitats on the planet. Mr. Hill pointed to section 28(1)(b) of the *Conservation Authorities Act*, which allows a conservation authority to make regulations in relation to "prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of river, creek, stream or watercourse, or for changing or interfering in any way with a wetland", and section 28(1)(c) "prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development". Mr. Hill argues that section 28(25)(d) of the *Conservation Authorities Act* defines development as including "the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere". He submits that the berm, therefore, constitutes development as defined by the *Conservation Authorities Act*.

[55] He then referenced Ontario Regulation 179/06 with respect to the regulations related to the LSRCA. Those regulations indicate that development in areas within the jurisdiction of the LSRCA cannot be undertaken in "(d) wetlands; or (e) other areas where development could interfere with the hydrologic function of a wetland, including areas within 120 metres of all provincially significant wetlands". The onus is on Mr. DiBlasi to show that the berm is not within the 120 metre setback of the PSW. A view of the photo located as Exhibit G to the affidavit of Mr. Alibhai, sworn September 23, 2013, shows that the berm is clearly within the setback area. Therefore, the regulation applies and permission is required before work can be undertaken.

[56] Mr. Hill takes the position that there is a public interest at stake, and an apparent breach of the *Conservation Act* regulation, which could result in harm to the environment. While Mr.

Hill was only an intervenor, and did not present evidence, he submitted that the court can take the LSRCA's concerns into consideration when exercising discretion as requested by the Region.

The Position of Mr. DiBlasi

[57] The defendants submit there is no evidence that the berm is located within the 120 metre setback of the PSW. Further, Mr. DeBlasi denies he is in violation of any section of the regulation because the berm does not interfere with any hydrologic function. The berm sits on the post-expropriation southerly edge of the property where it has not affected any of the water in the expanded ditch between the berm and Bloomington Road, or the condition of the land to the north of the berm. Further, the berm does not interfere with any existing channel of a river, creek, stream or watercourse because there is no river, creek, stream or watercourse to be interfered with, and no wetland in the area of the berm. Mr. DiBlasi's position is there is no evidence to the contrary.

[58] According to the expert of Mr. DiBlasi, Dr. Coleman, the water in the ditch infiltrates the land within 27 hours after rainfall, absent an extraordinary rain event. Dr. Coleman explains that the water goes underground to the pond as it always has. There is no water flow on the so called intermittent watercourse, other than when it rains, and there is therefore no waterbed or banks. The topographical survey relied upon by the Region does not show a watercourse, just a downward elevation line pointing towards the pond. The drainage course starts in the middle of the lands, and there is no evidence that any drainage course goes from the edge of Mr. DiBlasi's lands. Evidence provided by the Region does not support the contention that water flows from the ditch overland.

<u>Legal Issues and Analysis</u>

Statutory Injunction

[59] The Region seeks a statutory injunction pursuant to the *Municipal Act*, 2001. They rely on section 440 of the *Municipal Act*, 2001, which provides as follows:

> If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

[60] The Region relies on *Croplife Canada v. Toronto (City)*[7] for the proposition that the Ontario Court of Appeal has stated that the powers of municipalities under the *Municipal Act*, 2001 should be not be interpreted restrictively and a broad purposive approach should be used.

[61] Further, the Region's by-law number R-686-81-40 prohibits the obstructing or encumbrancing of regional roads without lawful authority.

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[7] (2005), 75 O.R. (3d) 357 (CA) at paras. 6 and 8.

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[62] In seeking a statutory injunction, the factors that would normally be considered in an application for an equitable injunction do not apply. Irreparable harm and balance of convenience do not need to be considered because the public authority is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest.[8]

[63] The breach must be a clear one, but once established the court will grant a statutory injunction on an interlocutory basis.[9] By way of balance, however, there is a higher evidentiary burden placed on the party seeking the injunction. The Region in this case must establish that a clear breach of the by-law has occurred.[10] By contrast, the responding party need only show it has an "arguable defence."[11]

[64] Finally, the fact that the defendants may suffer some hardship form the imposition of the injunction will not outweigh the public interest in having the law obeyed.[12]

[65] I find in the circumstances of this case that a statutory injunction must issue for the following reasons.

Mr. DiBlasi's Evidence is Unreliable

[66] I accept and find as a fact that the Region did not excavate the north ditch. I accept the affidavit evidence of Mr. Salim Alibhai that the work order at Exhibit A to his affidavit sworn December 4, 2013, relates to the south ditch and that as per undertaking no. 12 from his cross-examination on September 23, 2013, no other information about any work done on the north ditch by the Region was found.

[67] I also find that Mr. DiBlasi's evidence on this point is confused and unreliable. His affidavit sworn November 25, 2013, indicates that the photographs (taken by him) at Exhibit C are photos showing the north ditch after the work was done by the Region. However, in his cross-examination he concedes he may have been confused, and that the photographs at Exhibit C may well be photographs of the south ditch as put to him by counsel for the Region.[13]

[68] I do not accept the position of the defendants that prior to the work done by the Region on the south ditch that culvert C19 was blocked. Mr. DiBlasi's letter dated December 12, 2012, accuses the Region of illegally placing culvert C19 and "illegally directing into my property all the water coming the hwy (sp.)…." However, in his cross-examination Mr. DiBlasi concedes that culvert C19 has been there since before he bought the property in 1982, and that instead of

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[8] *Vancouver (City) v. Zhang*, 2009 BCSC 84 at paras. 18-19.
[9] *Newcastle Recycling v. Clarington (Municipality)* (2005), A.C.W.S. (3d) 359, 2005 CanLII 46384 (ONCA) at para. 32.
[10] *Peachland (District) v. Peachland Self Storage*, 2011 BCCA 466 (in chambers) at para. 30.
[11] *Ibid* at para. 30.
[12] *Canada v. Ipsco Recycling Inc.*, 2003 FC 1518 at paras. 50-51.
[13] Cross-examination of Gaetano DiBlasi, February 25, 2014, page 33, questions 195 and 197.

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accusing the Region of placing the culvert there he should have said "opened" in his December 12, 2012, letter.[14]

[69] In Mr. DiBlasi's letter of December 12, 2012, he explains that the construction of the berm was necessary to protect the water wells on his land from contamination of the water in the ditches opened up by the Region. However, in his cross-examination he denies that he built the berm to keep water off his property. Instead, he says that he built it to finish the berm on the north side of Bloomington Road.[15]

[70] Overall, I find that Mr. DiBlasi's evidence is unreliable. I accept that his motives for building the berm may not be as altruistic as he wishes this court to see them. As such, where Mr. DiBlasi's evidence and that of the Region conflict, I prefer the evidence of the Region.

The Evidence of the Region's Experts Should be Preferred

[71] It is not clear to this court that the defendants' expert would have been qualified to testify as an expert had a trial been held in this matter. As per *Fogan v. Nowacki*[16] the evidence of an architectural technologist was rejected on drainage issues because he "was not qualified to speak to technical and engineering issues and could offer no expert opposing evidence…."[17] In the case at bar, the Region's expert, Mr. Hagesteijn, was a qualified engineer with 30 years experience in storm water management. I accept that his scientific analysis using computer modelling should be preferred over Dr. Coleman's method of reviewing surveys and walking the property. To be clear, I do not take anything away from Dr. Coleman's expertise in land use planning and ecology. The fact remains, however, that such expertise is not the type of expertise needed to make the scientific assessments needed in this case.

[72] As such, I accept Mr. Hagesteijn's conclusions at page 14 of his report dated December 5, 2013, and specifically his conclusions that in summary are as follows:

(a) Prior to the construction of the berm, water drained from the ditches and culvert C19 into a watercourse on Mr. DiBlasi's property;

(b) The berm could create ponding up to a depth of 1.88m which is considered a safety hazard without a guide rail between the pond and the road edge;

(c) High water levels could result in pavement damage.

[73] The defendants submit that the Hagesteijn report fails to provide elevation levels for the southerly edge of the defendants' lands. The Region relied on elevations contained in a Ministry of Natural Resources ("MNR") survey going back to 2003. The defendants submit that the MNR

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[14] Cross-examination of Gaetano DiBlasi, February 25, 2014 at page28, questions 131-132.
[15] Ibid at page 9, question 16.
[16] 2012 CarswellOnt 14549 (OMB) at paras. 16 and 17.
[17] Ibid at para. 17.

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305 elevation line prevents the flow of water from expanded ditch onto the subject property, with or without a berm.

[74] With respect, there is no evidence of this. There is evidence that the location of culvert C19 is a low point, but there is no evidence that the 305 elevation acts as a barrier to keep water in the ditch. Mr. Hagesteijn was not asked to confirm this alleged fact in his cross-examination.

[75] The defendants also note that Mr. Hagesteijn does not dispute that water in the ditch infiltrates underground into the property to the north of the ditch within 27 hours. The defendants use this admission to imply that ponded water eventually seeps into the ground in any event and will not cause the problems alleged by the Region. With respect, Mr. Hagesteijn clarifies this issue in his cross-examination. He states that pre-berm the water flowed overland. Post-berm the water will infiltrate into the ground and either evaporate, infiltrate or "mainly it will sit as a lake there."[18] One cannot infer from Mr. Hagesteijn's evidence that infiltration is either an acceptable way of dealing with the ponding of that any infiltration will feed into the PSW.

[76] I also accept the expert evidence of Mr. Cameran Mirza, a professional engineer with 40 years experience in pavement engineering. I accept his evidence on the same basis as that of Mr. Hagesteijn. I accept his conclusion that the "capillary" effect of standing water in the ditches will weaken the pavement structure through freezing and thawing over time. This can reduce the life of pavement structure from 15-20 years to 3 years.[19]

[77] Mr. Mirza's report is criticized by the defendants for being too theoretical and for not providing an opinion about why the water is ponding. With respect, Mr. Mirza was not asked to give an opinion about the reason for the ponding. He was to provide an opinion with respect to the <u>impact</u> of the flooding/ponding on the current and proposed pavement structure. His report may be interpreted as somewhat theoretical as he was clearly asked to contemplate the future impact of flooding/ponding in the relevant areas. I find that Mr. Mirza has the qualifications to make such opinions and that giving an opinion about possible future outcomes for pavement damage was not outside of his expertise.

There is no Evidence of Flooding Prior to August 2012

[78] Mr. DiBlasi was unable to provide proof that such flooding existed as alleged. The photographs he provided were taken by him and showed flooding in July and September 2013. He did not produce any photographs of flooding prior to that date. He agreed in cross-examination that he had never seen conditions like this "since you opened the culvert."[20] I infer from this testimony that Mr. DiBlasi meant that he had never seen conditions like this (meaning flooding) since the Region did the work on culvert C19 in June 2012, and I accept that as his evidence. Mr. DiBlasi again blamed the flooding on the work done by the Region, but that does

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[18] Cross-examination of Mark Hagesteijn dated February 26, 2014, questions 36 and 46.
[19] Report of Cameran Mirza dated April 29, 2013, page 3.
[20] Cross-examination of Gaetano DiBlasa on February 25, 2014, page 23, questions 107 and 109.

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not take away from his observations of the increased water levels from the photographs taken after the berm was constructed.

[79] Further evidence of flooding after the construction of the berm was in the form of concern by the occupants of the property adjacent to the south ditch, namely, Miller Waste Systems. This concern was raised by Miller in November 2012. Upon inspection by the Region in November 2012 it was determined that the berm was preventing water from flowing in its normal course through culvert C19. A demand letter to remove the berm was sent to the defendants shortly thereafter.[21]

[80] There is also photographic evidence which confirms the flooding after August 2012. Photograph 2 in the compendium was taken in 2007 and shows the area in which the berm was ultimately constructed. The land can be seen to slope down towards the defendants' property. Also, photographs 5, 6, 7 and 8 in the compendium taken after the berm was constructed clearly show flooding in both ditches.

[81] Mr. DiBlasi argues that the photographs at Exhibit C of his affidavit sworn November 25, 2013, are evidence of flooding prior to the construction of the berm, as those photographs were taken in July 2012. It must be kept in mind however, that Mr. DiBlasi's evidence on cross-examination was that he was not sure that these photographs are of the north ditch or the south. The Region submits that these photos are of the south ditch, and that the allegations of the defendants that the Region's work on the north ditch causing the flooding are false and in any event cannot be corroborated by Mr. DiBlasi. Moreover, the photographs at Tab 6 of the compendium are from Mr. DiBlasi's own records and clearly show flooding in the north ditch in July 2013.

The Berm is Preventing the Flow of Water to the PSW

[82] While it is true that Mr. Hagesteijn has never personally observed an intermittent water course on the property, nor any water flowing overland onto the subject property from the ditch, that does not mean that such a watercourse does not exist.

[83] I accept Mr. Hagesteijn's findings that prior to the construction of berm, water flowed from the north ditch onto the defendants' property as sheet flow and then narrowed into a watercourse. I accept that a watercourse does not always need to be filled with water to be an area in which water flows. The markings of such a course can clearly be seen in the aerial photograph at Tab 4 of the compendium in the form of the brown coloured area leading into the PSW. Further, the Delph & Jenkins survey dated 2000 and produced by the defendants shows a marked "drainage course" in the same area.

[84] According to the LSRCA the berm is blocking the flow of water from the ditch and across the defendants' land into the PSW. They have served Vito DiBlasi with a Notice of Violation dated September 26, 2012, with respect to the unauthorized development, interference or alteration in or on a wetland setback. While this case is not concerned with that prosecution, it

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[21] Affidavit of Salim Alibhai sworn September 23, 2013 paras 28-30.

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would seem odd that the LSRCA would pursue such a prosecution without confidence that the subject berm was actually within the wetland setback. Further, the LSRCA map located at page 57 of the Region's motion record clearly shows the berm within the boundary of the setback.

[85] I find that Mr. DiBlasi's argument that the berm is not within the setback area to be disingenuous in the face of the evidence presented. It appears he does not like to be told what to do when it comes to his property. He applied for permission to construct the berm only after he had already constructed it. In 2007 he submitted a permit for placement of fill only after he received a Notice of Violation from the LSRCA. Mr. DiBlasi appears to like to act first and seek required permission later.

A Ditch is Part of the Road over which the Region has Jurisdiction

[86] The *Municipal Act*, 2001, S.O. 2001 c. 25, does not define the term "road". However, it does contain a definition of "highway" at section 1(1):

> "highway" means a common and public highway and includes any bridge, trestle, viaduct or other structure forming part of the highway and, except as otherwise provided, includes a portion of a highway; ("voie publique")

[87] In W.D. Russell in *Russell on Roads*, at page 51, (2nd Ed., Carswell: Toronto (2008)), states that "the term 'common and public highway' in the *Municipal Act*, 2001 refers to roads owned by the municipality."

[88] Section 26 of the *Municipal Act*, 2001, specifies what is considered a "highway":

> The following are highways unless they have been closed:
> 1. All highways that existed on December 31, 2002.
> 2. All highways established by by-law of a municipality on or after January 1, 2003.
> 3. All highways transferred to a municipality under the *Public Transportation and Highway Improvement Act*.
> 4. All road allowances made by the Crown surveyors that are located in municipalities.
> 5. All road allowances, highways, streets and lanes shown on a registered plan of subdivision.

[89] The *Municipal Act*, 2001 recognizes at section 44(8) that parts of a highway can be "untravelled":

> (8) No action shall be brought against a municipality for damages caused by,
> (a) the presence, absence or insufficiency of any wall, fence, rail or barrier along or on any highway; or

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> (b) any construction, obstruction or erection, or any siting or arrangement of any earth, rock, tree or other material or object adjacent to or **on any untravelled portion of a highway**, whether or not an obstruction is created due to the construction, siting or arrangement. [Emphasis added.]

[90] In the case of *Stager v. Muskoka Lakes (Township)*, 71 O.R. (2d) 126, the court notes "[I]n my view the road includes not only the travelled portion but also the ditches and verges and the full extent of the road allowance". However, this case interprets the 1980 version of the *Municipal Act*, R.S.O. 1980, c. 302. The case was affirmed at the High Court of Justice, Divisional Court, (1989), 71 O.R. (2d) 126. The definition of "road" adopted in *Stager* was also mentioned in *Saiviarkand Investments Ltd. v. Toronto (City)*, [2009] O.J. No. 6424, at para. 16.

[91] In *R. v. Wassilyn*, 2006 ONCJ 248, the central issue was whether the definition of "street" in the *Toronto Municipal Code*, Chapter 743, includes a sidewalk. The *Toronto Municipal Code* defines "street" as a "highway" as defined in section 1(1) of the *Municipal Act*, 2001. The court ruled that the definition of "highway" included the sidewalk. At paras. 8-11, the decision was based on a close interpretation of the *Municipal Act*, 2001, itself and jurisprudence:

> **8** Section 55(1) of the act provides: An upper-tier municipality is not responsible for the construction and maintenance of sidewalks on its highways and the lower-tier municipality in which the highways are located is responsible for the <u>construction and maintenance of the sidewalks and has jurisdiction over that part of the highway</u>, unless the municipalities agree otherwise. (emphasis added).
>
> **9** Similar references to sidewalks forming a part or parts of highways are also found in sections 42, 60, and 297 of the *Municipal Act*, R.S.O. 1990 c. M.45.
>
> **10** The civil jurisprudence while not directly applicable, in my opinion, supports the respondent's position that the sidewalk forms part of the highway. In *Green et al. v. Dixon Road Car Wash Ltd et al.*, (1981), 124 D.L.R. (3d) 503 Justice Craig noted at p. 505:
>
> - If "highway" in s. 427(1) does not include "sidewalk" then, aside from cases where snow and ice are involved (s. 427(4)), actions against municipalities for damages with reference to sidewalks would be confined to a common law right of action based on misfeasance; the statutory liability for non-repair would not arise. In my opinion that is clearly not the case; "sidewalk" must be considered as part of a highway as defined in the *Municipal Act*, s. 1, para. 10, and referred to in s. 427(1). For years the cases have all proceeded on that basis and assumption. To mention a few: *Gilmour v. City of Toronto* (1926), 30 O.W.N. 319 at p.

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> 320; *McCracken v. Hamilton*, [1959] O.W.N. 128; affirmed [1960] O.W.N. 74.
>
> **11** In the case of *122-124 Avenue Road Holdings Inc. v. Toronto (City)* (1992), 6 O.R. (3d) 661 Cavarzan J. noted at p. 663:
>
> - It is undisputed that "highway" in the Municipal Act includes all of the highway, that is to say, the roadway, the sidewalks, and the boulevards.

[92] In *McQueen v. Niagara-on-the-Lake (Town)* (1987), 9 A.C.W.S. (3d) 45, [1987] O.J. No. 2416, at para. 13 the court ruled that a boulevard, which is between a sidewalk and a roadway was part of the "highway". However, this case interpreted a previous 1980 version of the Act at section 257.

[93] If the reasoning of *Wassilyn* and *McQueen* is applied to the issue at hand, then a "highway" under the Act includes a sidewalk and a boulevard, and must also include the ditch within its parameters. This conclusion is bolstered by section 44(8) of the *Municipal Act*, 2001 that recognizes that some parts of a "highway" are untraveled.

Clear Breach of the Municipal By-Law and Flagrant Breach of Regulation 179/06

[94] Given the above I find that there has been a clear breach of by-law R-686-81-40 and CAA regulation 179/05 in that:

(a) The ditch forms part of the road – being Bloomington Road.

(b) It is undisputed that Bloomington Road is a road under the jurisdiction of the Region;

(c) The berm was constructed by the defendant Gaetano DiBlasi;

(d) The berm has caused the flooding in the north ditch;

(e) The berm is an "encumbrance" which has been interpreted to include an item which clogs, impedes, hinders or obstructs;[22]

(f) The berm is located within the PSW setback;

(g) The berm prevents the flow of water overland to the PSW which is a clear breach of Regulation 179/06;

(h) There are no exceptional circumstances which would prevent the granting of the injunction;

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[22] *R. v. Goodfellow*, 2009 ONCJ 543 at para. 7.

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(i) The infringements of by-laws in other areas of Bloomington Road which have not been addressed by the Region, as alleged by the defendants, are not a defence to this action; and

(j) The flooding in the north ditch will harm the pavement structure of Bloomington Road even with regular maintenance;

[95] In the event I am wrong with respect to the test for a statutory injunction, an injunction would issue based on the berm being a public nuisance. The same principles apply to the test for a public nuisance as a statutory injunction.

[96] A public nuisance may be an activity which interferes with the public's interest in health, safety, morality or convenience or it may involve interference with a public right of way such as a street or highway.[23]

[97] There is no doubt that the ponding in the ditches creates inconvenience as the public in York Region have had to pay over $11,000 to pump out the ditches since the berm was erected. Further, there are public safety issues related to the citizens of York Region and indeed any motorist using that section of Bloomington Road given that ponding could result in the drowning death of a motorist. Finally, there is the issue of the ponding creating a habitat for mosquito larvae and the public safety issues related to the potential spread of West Nile virus.

[98] The defendants argue that the Region has not met the test for public nuisance in that it has not established "special or peculiar damage" which is defined as extraodinary, direct and not fleeting. The defendants rely on the academic paper of Professor Alistair R. Lucas[24] for this proposition. The defendants argue that there is no evidence of damage to the pavement or a mosquito hazard, nor any damages special to the Region.

[99] I respectfully disagree. In *Torino Motors (1975) Ltd. v. Kamloops (City)* (1988), 63 D.L.R. (4th) 168 (BCCA) at para. 4 the court held that "[n]uisance includes the escape of water which inflicts damage, injury and inconvenience on all who come with the ambit of the nuisance." I infer from this that nuisance may include not just the escape of water, but also the accumulation or ponding of water. I also find that the "all" referred to in this passage would include not just the public, but PSWs, which are areas designated to protect wetlands and the environment with the public interest in mind.

[100] I also do not find there any special circumstances which would prevent the issuing of an injunction in nuisance.

[101] The defendants raise the issue of whether this court has the jurisdiction to issue a mandatory injunction which is available only at common law. The Region responds with two

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[23] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (SCC) at para. 52.
[24] "Public Nuisance: Public Wrongs and Civil Rights of Action" A Symposium on Environment in the Court Room, March 23-24, 2012, University of Calgary.

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arguments. First, removal of the berm is a form of restraining the defendants from continuing to contravene the by-law. As well, section 62.1 of the *Municipal Act*, 2001, sets out as follows:

> 62.1 (1) A municipality may apply to a judge of the Superior Court of Justice for an order requiring the owner of land lying along a highway to remove or alter any vegetation, building or object on the land that may obstruct the vision of pedestrians or drivers of vehicles on the highway, cause the drifting or accumulation of snow or harm the highway if the municipality is unable to enter into an agreement with the owner of the land to alter or remove the vegetation, building or object from the land. 2002, c. 17, Sched. A, s. 10.
>
> **Order**
>
> (2) Upon application by the municipality under subsection (1), the judge may make an order, subject to the payment of such compensation to the owner or other conditions as the judge may fix,
>
> (a) requiring the owner of the land to remove or alter the vegetation, building or object in respect of which the application is made; or
>
> (b) authorizing the municipality to enter upon the land, upon such notice to the owner as the judge may fix, to remove or alter the vegetation, building or object. 2002, c. 17, Sched. A, s. 10.

[102] The Region submits that this section of the *Municipal Act*, 2001, permits a mandatory order if the object will cause damage to the road. As I have already found that the road includes the ditch and as the conclusions in Mr. Mirza's report concerning damage to the pavement have been accepted by this court, I find that this section of the *Municipal Act*, 2001, gives this court authority to require the "object" (in this case the berm) to be removed as harm to the highway will otherwise result.

[103] If I am incorrect with respect to the interpretation of section 62.1 of the *Municipal Act*, 2001, regarding the removal of the berm, I agree with the Region that restraining the defendants from continuing contravention of the by-law would include requiring the berm to be removed.

[104] As a statutory injunction and an injunction on the grounds of public nuisance have been granted there is no need to address the additional issues of irreparable harm and balance of convenience.

[105] The defendants shall remove the berm entirely by July 31, 2014. If they fail to do so by that date, the Region may remove the berm and the defendants shall pay the cost of the said removal by the Region.

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Costs

[106] If the parties cannot agree on costs I will receive written submissions on a seven day turnaround by June 19, 2014, starting with the Region, then the defendants and then the Region by way of reply (if the Region wishes to file one). Written submissions shall be no longer than two pages in length, exclusive of any Bill of Costs or Offer to Settle. If no costs submissions are received within 35 days of the release of this judgment, costs will be deemed to be settled and no further submissions shall be received.

Justice C.A. Gilmore

Released: May 28, 2014

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TAB 14

All England Law Reports/1978/Volume 3 /Kent County Council v Batchelor - [1978] 3 All ER 980

[1978] 3 All ER 980

Kent County Council v Batchelor

QUEEN'S BENCH DIVISION

TALBOT J

2, 5 DECEMBER 1977

Practice - Parties - Local authority - Promotion or protection of interests of inhabitants of their area - Local authority obtaining injunction to restrain breaches by defendant of tree preservation order - Local authority applying for committal of defendant for breaches of injunction - Whether local authority bound to sue on relation of Attorney General - - Whether local authority entitled to obtain injunction in own name - Local Government Act 1972, s 222(1)(a).

The defendant was a farmer who owned woodland which was subject to a tree preservation order made by the local authority under the Town and Country Planning Act 1971. The authority decided that the defendant was acting in breach of the preservation order and, acting under the power conferred on local authorities by the Local Government Act 1972, s 222(1)(a)[a], to institute civil proceedings in their own name where it was 'expedient for the promotion or protection of the interests of the inhabitants of their area,' brought an action against the defendant seeking an injunction and damages. The authority obtained an interim injunction restraining the defendant from damaging or destroying the trees. A committal order obtained by the authority against the defendant for alleged disobedience of the interim injunction was later quashed by the Court of Appeal on the ground that there was insufficient evidence to commit the defendant. Some time later the authority again sought to commit the defendant for alleged breaches of the interim injunction. The defendant denied the allegations and applied to have the interim injunction discharged on the grounds (i) that the authority had had no locus standi to obtain the injunction since the proceedings should have been brought by the Attorney General by way of a relator action,

[a] Section 222(1), so far as material, is set out at p 983 *e*, post

(ii) that the court would not have had jurisdiction to grant an injunction even if the proceedings had been brought by the Attorney General because the Attorney General was restricted to obtaining an injunction where there were criminal acts being committed and the penalties were wholly inadequate or where urgent action was required, and (iii) that by applying for a committal order the authority were seeking to expose the defendant to a greater penalty, namely imprisonment, than the fine provided for under the 1971 Act.

Held - The defendant's application to discharge the interim injunction would be dismissed for the following reasons--

(i) It was too late for the defendant to raise the issue of the authority's locus standi since the court was bound by the fact that the Court of Appeal had accepted that there was jurisdiction to make the injunction. Furthermore, the effect of s 222 was that a local authority was not necessarily required to obtain the concurrence of the Attorney General before instituting civil proceedings (see p 983 *b* to *d*, post); *Prestatyn Urban District Council v Prestatyn Raceway Ltd* [1969] 3 All ER 1573, *Solihull Metropolitan Borough Council v Maxfern Ltd* [1977] 2 All ER 177, *Stafford Borough Council v Elkenford* [1977] 2 All ER 519 and *London Borough of Hammersmith v Magnum Automated Forecourts Ltd* [1978] 1 All ER 401 considered.

(ii) The authority were not limited to obtaining an injunction in circumstances where the Attorney General could have obtained one because they were not merely attempting to restrain the commission of criminal acts in circumstances where the penalties were wholly inadequate. The authority's statutory duty to protect areas of natural beauty did not stop at making tree preservation orders but extended to enforcing those orders to prevent interference with those areas, and they were empowered by s 222 to take proceedings in the interest of the inhabitants of their area to prevent breaches of tree preservation orders (see p 983 *g* and p 986 *e* to *j*, post);*Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 distinguished.

Notes

For the power of local authorities to prosecute or defend, see 24 *Halsbury's Laws* (3rd Edn) 630, para 1149, and for cases on enforcement of orders of the court by local authorities, see 33 *Digest* (Repl) 29, 30, *139-145*.

For the Local Government Act 1972, s 222, see 42 *Halsbury's Statutes* (3rd Edn) 1053.

Cases referred to in judgment

Attorney General v Chaudry [1971] 3 All ER 938, [1971] 1 WLR 1614, 70 LGR 22, CA, *Digest* (Cont Vol D) 533, *59a*.

Attorney General (on the relation of Manchester Corpn) v Harris [1960] 3 All ER 207, [1961] 1 QB 74, [1960] 2 WLR 532, 58 LGR 242, CA, 16 *Digest* (Repl) 542, *3831*.

Barnet London Borough Council v Eastern Electricity Board [1973] 2 All ER 319, [1973] 1 WLR 430, 137 JP 486, 71 LGR 254, 25 P & CR 261, DC, *Digest* (Cont Vol D) 935, *156d*.

Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, [1977] 3 WLR 300, HL.

London Borough of Hammersmith v Magnum Automated Forecourts Ltd [1978] 1 All ER 401, [1978] 1 WLR 50, [1978] LGR 159, CA.

Prestatyn Urban District Council v Prestatyn Raceway Ltd [1969] 3 All ER 1573, [1970] 1 WLR 33, *Digest* (Cont Vol C) 284, *3852d*.

Solihull Metropolitan Borough Council v Maxfern Ltd [1977] 2 All ER 177, [1977] 1 WLR 127, 75 LGR 327.

Stafford Borough Council v Elkenford Ltd [1977] 2 All ER 519, [1977] 1 WLR 324, 75 LGR 337, CA.

Motion to commit

By a writ dated 5 April 1976, the Kent County Council and the Maidstone Borough Council, sought an injunction to restrain the defendant, Hubert Dorrington Batchelor,

[1978] 3 All ER 980 at 982

from cutting down, uprooting, topping, lopping or otherwise in any way damaging or destroying any tree or from causing or permitting any of those operations in relation to any tree on land owned or occupied by the defendant, which tree was the subject of the Kent County Council (Maidstone Borough) Preservation (No 1) Order 1975 made under s 60 of the Town and Country Planning Act 1971 or alternatively damages. On 13 April Chapman J granted an interlocutory injunction to restrain the defendant from any of the acts complained of in the writ. On 25 June Caulfield J committed the defendant to a month's imprisonment for breach of the interlocutory injunction, but the committal order was discharged by the Court of Appeal. On 10 November 1977 the plaintiffs, the Kent County Council, issued another notice of motion to commit the defendant who in turn applied to discharge the interlocutory injunction. The facts are set out in the judgment.

Raymond Sears QC and Anthony Dinkin for the plaintiffs.

George Newman for the defendant.

5 December 1977. The following judgment was delivered.

TALBOT J.

This matter comes before me as a motion to commit the defendant to Her Majesty's prison for contempt of court, in that he has acted in disobedience of an order of Chapman J, dated 13 April 1978. In addition to that motion, there is before me an application to discharge the order made by Chapman J. At the outset it seemed to me more logical to hear the application to discharge the injunction first because many of the matters which fell to be discussed in that application had a bearing on the motion to commit.

The events which it is necessary to bear in mind are as follows: the defendant, who is a farmer and has woodland on his farm on the North Downs in Kent, had a tree preservation order made in respect of some part of his woodland on 30 September 1975. A further order was made on 26 March 1976. On 5 April 1976 the plaintiffs issued a writ against the defendant claiming an injunction to restrain him from cutting down, uprooting, topping, lopping or otherwise in any way damaging or destroying any tree or from causing or permitting any of those operations in relation to any such tree on land owned or occupied by him, which tree is the subject of a tree preservation order, the order being made under s 60 of the Town and Country Planning Act 1971. Alternatively the writ claimed damages. On 13 April Chapman J made the interlocutory injunction which I have referred to, an injunction to restrain the defendant from those acts which are complained of in the writ. On 25 June the defendant was brought before Caulfield J on a motion to commit him to prison for breach of Chapman J's order, and after hearing evidence Caulfield J ordered that the defendant be imprisoned for one month. The defendant then, through his counsel, applied immediately to the Court of Appeal for bail, which was granted. There followed on 1 October the plaintiffs' statement of claim and on 5 October 1976 the order made by

Caulfield J came before the Court of Appeal which quashed the order. It would seem from the report[b] that the order was quashed on the grounds that there was insufficient evidence to show that the defendant had been in breach of the injunction. That is the background.

b [1976] The Times, 7 October

This motion to commit is based on alleged breaches of the injunction committed on 31 July 1977. Turning, therefore, to the first application that I consider, namely the application to discharge the injunction, counsel for the defendant submitted first that there was no jurisdiction to grant an injunction because the plaintiffs have no locus standi. The submission is that these proceedings should have been brought by the Attorney General on the relation of the present plaintiffs and that by reason of the fact that the Attorney General is not a party to these proceedings they are misconceived.

His second submission was that if that first submission was wrong, then again this court would have had no jurisdiction to grant such an injunction because, assuming that there was power to make such an order, the court could only have made such an order on the same grounds on which it could have done so had the Attorney General been a party. In

[1978] 3 All ER 980 at 983

other words, that these plaintiffs are in no better position than the Attorney General would have been had he been a party, and had he been a party, this court would not have had power on these facts to make such an order.

Thirdly, it was submitted that if the order made by Champman J was a valid order then there ought to be no committal nor should this court proceed to hear the motion to commit until criminal proceedings have been taken before the appropriate court for the alleged breaches which form the subject of the motion.

In find that the first submission that I have no jurisdiction to entertain the motion is one that, as far as I can see, it is difficult to support. These proceedings were begun by writ. There was an appearance, unconditional, to that writ. The matter came before Chapman J, before Caulfield J and before the Court of Appeal, as I have said. No plea to the jurisdiction to make such order has ever been raised until the hearing before me on this motion.

The matter having been before the Court of Appeal, I accept the submission of counsel for the plaintiffs that, the Court of Appeal having dealt with the matter on the basis that the relevant section, to which I will come shortly, applied, their dealing with the matter binds me and therefore compels me to deal with the matter on the basis that I have jurisdiction. It seems to me it would be quite wrong for me to take the view that, because the relevant section, s 222 of the Local Government Act 1972, was not argued before the Court of Appeal on the basis that there was no jurisdiction under it, I ought to assume that the Court of Appeal continued to hear the application when in fact they had no jurisdiction to do so. The view I take is that I must accept that the Court of Appeal accepted jurisdiction, and therefore I must accept jurisdiction.

The relevant section by virtue of which the proceedings are brought is s 222 of the 1972 Act, which reads:

> '(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants in their area--*(a)* they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name ... '

I need not refer to sub-para *(b)* of sub-s (1). That section was the successor to s 276 of the Local Government Act 1933. The power to bring proceedings by local authorities was contained in that section which read as follows: 'Where a local authority deem it expedient for the promotion or protection of the interests of the inhabitants of their area, they may prosecute or defend in any legal proceedings.'

The additional power conferred by s 222 of the 1972 Act is therefore that they may in the case of civil proceedings institute them in their own name. Examples of a local authority exercising their rights under s 222 may be seen in two authorities. The first is *Solihull Metropolitan Borough Council v Maxfern Ltd*. In that case there came before Oliver J a motion by the plaintiff borough council to obtain an injunction restraining the defendants from using land as a retail market on Sundays. The defendants, and I take this from the headnote, moved to strike out the writ as the action was for enforcement of a public right and had to be instituted in the name of the Attorney General. Oliver J held that s 222 in the circumstances of the case before him enabled the plaintiffs to sue in their own name. Speaking of powers conferred by s 222 Oliver J said this ([1977] 2 All ER 177 at 181, [1977] 1 WLR 127 at 131):

> 'Section 222 of the 1972 Act has a much wider ambit and is dealing I think generally with any proceedings of any sort which a local authority may feel it necessary to institute in the interests of the inhabitants of their area. On that footing, the insertion of the words "in the case of civil proceedings, may institute them in their own name" is really almost exactly the same as the words "may in their own name take proceedings in the High Court" which were inserted in s 100 of the Public Health

[1978] 3 All ER 980 at 984

> Act 1936--except, of course, that in the 1972 Act the civil proceedings are not necessarily restricted to the High Court. For these reasons I am of opinion, and I hold, that the effect of s 222 of the 1972 Act is to enable the local authority to sue in its own name and without the intervention of the Attorney General in cases where prior to the Act it had been necessary to obtain the concurrence of the Attorney General.'

I do not think it appears clearly from the report, but I assume that the local authority, the plaintiffs there, were pursing their duties under the Shops Act 1950, whereby there was a duty on them to enforce certain provisions of that Act.

The next case was *Stafford Borough Council v Elkenford Ltd*. Thatwas a similar case where the plaintiff local authority had moved the court for an injunction to restrain the defendants from using or permitting a site to be used as a retail market on Sundays. It was held by the Court of Appeal, dismissing the appeal, that as the local council had invoked the statutory remedies available to them, and it had been shown that that defendants would continue their profitable operations in defiance of the provisions of the Shops Act 1950 unless effectively restrained, the court would in the exercise of its discretionary jurisdiction ensure obedience by granting an injunction, even though the appeal procedures set in train against the conviction had not been exhausted. There again, therefore, the proceedings to enforce their duties under the Shops Act 1950 were brought by the local authority by reason of their powers under s 222. The principal point of that case was whether or not it was right to grant an injunction.

Counsel for the defendant, having dealt with those two cases, proceeded to argue that the powers under s 222 are limited. He began his argument on this point by referring me to *Prestatyn Urban District Council v Prestatyn Raceway Ltd*. There the plaintiff local authority moved the court for interlocutory injunctions restraining the defendants' activities which included the use of a piece of land for night trotting meetings. Goff J dealt with an argument that they were permitted to bring these proceedings by virtue of s 276 of the Local Government Act 1933, and he held that that section

was not wide enough to permit the plaintiffs to bring the action on their own behalf. It did not remove, Goff J held, the need for the Attorney General to take over the proceedings. Counsel's argument for the defendant that what in effect is happening here is that the plaintiffs, in this present case, are seeking to restrain the defendants from committing criminal offences. He drew my attention to s 102 of the Town and Country Planning Act 1971, as amended by s 10 of the Town and Country Amenities Act 1974. That section is the penalty section for breaches of tree preservation orders, and reads:

> '(1) If any person, in contravention of a tree preservation order, cuts down, uproots or wilfully destroys a tree, or wilfully damages, tops or lops a tree in such a manner as to be likely to destroy it, he shall be guilty of an offence and shall be liable ... '

And then I summarise the penalties: on summary conviction to a fine not exceeding £400 or twice the sum which appears to the court to be the value of the tree, whichever is the greater; or on conviction on indictment to a fine, and then there are certain considerations the court must bear in mind in determining the amount of the fine. It is to be noted that there is no penalty of imprisonment, and one of counsel's submissions for the defendant is that the effect of an injunction as granted in these proceedings is to expose the defendant to a greater penalty, namely one of imprisonment, than is laid down in the Act which creates the offence for the breach of the tree preservation order.

Another argument that he presented was based on *London Borough of Hammersmith v Magnum Automated Forecourts Ltd*. The Act that came before the court for consideration in that case was the Control of Pollution Act 1974, and an interlocutory injunction had been granted to the plaintiffs to restrain the defendants from certain operations. The

[1978] 3 All ER 980 at 985

powers of the local authority in the circumstances prevailing in that case are contained in s 58(1) of that Act. They may take proceedings where they are satisfied that there is noise amounting to a nuisance, but the importance of that Act in relation to counsel's submission lie in s 58(8) which reads:

> 'If a local authority is of opinion that proceedings for an offence under subsection (4) of this section would afford an inadequate remedy in the case of any noise which is a nuisance, they may take proceedings in the High Court ... for the purpose of securing the abatement, prohibition or restriction of the nuisance, and the proceedings shall be maintainable not withstanding that the local authority has suffered no damage from the nuisance.'

That Act was passed, as I understand it, after the commencement date for the 1972 Act. Counsel's point, which has force, is that if s 222 of the 1972 Act gave the local authority the right to bring the proceedings in their own name in circumstances such as these, why did Parliament think it necessary to give them, in the control of pollution, the powers which are set out in s 58(8)? It has been suggested by counsel for the plaintiffs that possibly the draftsman inserted sub-s (8) ex abundanti cautela. But whatever the reason it appears that nothing turned on it. Section 222 of the 1972 Act was referred to at the hearing before the Court of Appeal, and indeed one can see from the report that *Stafford Borough Council v Elkenford Ltd* was also referred to and that was, as I have indicated, a s 222 case.

But the principal submission that counsel for the defendant has made is that the authority of the House of Lords in *Gouriet v Union of Post Office Workers* has clarified the law so that the result is now that it can be seen that the powers of the local authority under s 222 is limited, and he submits even if the plaintiffs here had the right to bring their claim by virtue of s 222, nevertheless, they are limited to those sorts of matters to which the Attorney General, as can be seen from the *Gouriet* case, is also limited, such matters, counsel for the defendant submitted, as bringing proceedings in order to fulfil their duty under the Shops Act 1950 or to bring proceedings to enforce bylaws. With regard to s 222 Lord Dilhorne said ([1977] 3 All ER 70 at 94, [1978] AC 435 at 494):

> 'The conclusion to which I have come in the light of the many authorities to which we were referred is that it is the law, and long established law, that save and insofar as the local Government Act 1972, s 222, gives local authorities a limited power so to do, only the Attorney-General can sue on behalf of the public for the purpose of preventing public wrongs and that a private individual

> cannot do so on behalf of the public though he may be able to do so if he will sustain injury as a result of a public wrong. In my opinion the cases establish that the courts have no jurisdiction to entertain such claims by a private individual who has not suffered and will not suffer damage.'

Based on the principles of *Gouriet*, counsel for the defendant submitted that this court had no jurisdiction, as indeed Chapman J had no jurisdiction to make the order that was made. I have already dealt with why I cannot accept that I am bound by that submission. However, it is of some force in the second submission that I have referred to, namely that in any event the local authority could do no more than the Attorney General. As to the limitation of the Attorney General, Lord Dilhorne said ([1977] 3 All ER 70 at 91, [1978] AC 435 at 491):

> 'One category of cases in which the Attorney-General has successfully sought an injunction to restrain commission of criminal acts is where the penalties imposed for the offence have proved wholly inadequate to deter its commission.'

[1978] 3 All ER 980 at 986

He then referred to three authorities, and in the final one, *Attorney General v Harris*, Lord Dilhorne said that there the defendant had been convicted on no less than 142 occasions of breaches of the Manchester Police Regulation Act 1844. Lord Dilhorne then said ([1977] 3 All ER 70 at 91-92, [1978] AC 435 at 491):

> '*In Attorney General v Chaudry* an injunction was granted at the instance of the Attorney General in a relator action to restrain the defendant from using a building as a hotel without a certificate under the London Building Acts (Amendment) Act 1939. There was a serious fire risk and it was not possible to secure the early hearing of a summons charging the defendant with a criminal offence in so using the building without a certificate. In those circumstances an interlocutory injunction was granted prohibiting the use of the building as an hotel until the necessary certificate had been granted. [He went on, however, to say:] I do not wish to suggest that the cases to which I have referred are the only types of cases in which the civil courts can and should come to the aid of the criminal law by granting injunctions at the instance of the Attorney General but they, I think, serve to show that the exercise of that jurisdiction at the instance of the Attorney General is exceptional.'

Thus, argued counsel for the defendant, insofar as he says the plaintiffs in the present case are seeking by these proceedings to prevent the commission of criminal offences under s 102 of the 1972 Act, they are limited to the same type of offence which limits the Attorney General, namely where there are commissions of criminal acts, the penalties for which are wholly inadequate, or where there is some great urgency to take action.

Similar views were expressed by Lord Edmund-Davies, and indeed in a prior speech by Lord Diplock. I was referred in detail to what was said. I need not in this judgment read the relevant parts. It is right, therefore, said counsel for the defendant, that this injunction ought to be discharged because the offences which the plaintiffs are seeking to prevent do not fall within the category of offences which, if they are entitled to act as the Attorney General could have acted, he could have proceeded on.

I do not consider that it is correct merely to look on this as if the plaintiffs in these proceedings are seeking only to prevent the defendant from committing further breaches of the tree preservation order. The plaintiffs here are a local authority who had duties under the Town and Country Planning Acts to protect areas of natural beauty. They fulfilled that duty by making the relevant tree preservation orders. Their duties do not stop at making the orders. In order to protect those areas of natural beauty in respect of which they made the orders, they must see that they are preserved, and one of the ways of preserving those areas is by enforcing the orders which they have made. It is not just a case of taking action to prevent a criminal offence. It is a case of preventing interference with the areas of natural beauty which they have sought by their tree preservation orders to preserve.

I do not accept, therefore, that the effect of *Gouriet v Union of Post Office Workers* is to so limit the powers of a local

authority under s 222 as argued by counsel for the defendant. As counsel for the plaintiffs has pointed out, the limitation which lies on a local authority in using their powers under s 222 is that it must be for the promotion or protection of the interests of the inhabitants of their area. In my judgment the wording of that section is wide enough to give these plaintiffs the power to take proceedings in the interest of the inhabitants of their area to prevent infringements of the tree preservation orders that they have made. It would not be right, therefore, in my judgment to discharge the order made by Chapman J.

The next submission that followed on my refusal to discharge the injunction is that I should adjourn these proceedings. It was argued by counsel for the defendant that there is no urgency. The plaintiffs have waited since 31 July when the alleged breaches are said

[1978] 3 All ER 980 at 987

to have occurred in order to move the court to commit the defendant. It would be to the prejudice of the defendant if the matter were to go forward, and he emphasised the words of Lord Fraser of Tullybelton in the *Gouriet* case ([1977] 3 All ER 70 at 117, [1978] AC 435 at 521): 'In a case that attracts publicity, punishment for breach of interdict might prejudice a subsequent jury trial.' As a matter of justice, I ought not, he submits, to allow this motion to go forward; the matter should be adjourned so that such steps as might be deemed proper to be taken by way of prosecution of the defendant can be taken and he can be brought before the magistrates.

The plaintiffs, I am told, have no wish to prosecute the defendant. They do not intend to prosecute, and indeed counsel on their behalf has offered an undertaking that they will not prosecute the defendant for the matters which took place in July 1977, and counsel for the plaintiffs says with some force it is not only justice to the defendant that must be considered, but justice to the plaintiffs and those for whom they are bringing these proceedings. The plaintiffs have a duty to protect public amenities.

In this matter which came before the Court of Appeal Lord Denning MR[c] is reported as having said that he--

[c] [1976] The Times, 7 October

> '... sympathised a great deal with the Kent County Council. There was nothing so important as that, in areas of natural beauty, the trees and the woodland should be preserved; and if there was any deliberate and proved offence against a tree preservation order, the County Council should take steps. It might well be a sentence of imprisonment for breach of such an order would be justified.'

In the Divisional Court, in *Barnet London Borough Council v Eastern Electricity Board* ([1973] 2 All ER 319 at 323, [1973] 1 WLR 430 at 434), a case involving a tree preservation order, May J who gave the judgment of the Divisional Court said:

> 'Consequently in our judgment one must bear in mind in this case that the underlying purpose of the relevant legislation is the preservation of trees and woodlands as amenities, as living creatures providing pleasure, protection and shade; it is their use as such that is sought to be preserved ... '

My conclusion on this matter is that I can see no ground for adjourning this motion. It is rightly brought, as I find, under the Act in question. There is no question of prosecution of the defendant. I do not have to exact any undertaking. The plaintiffs are responsible authorities and having told me that they do not intend to prosecute, I accept it. For these reasons the motion must proceed.

Defendant's application to discharge the injunction or to adjourn the proceedings dismissed.

Solicitors: Sharpe, Pritchard & Co agents for W G Hopkin, Maidstone (for the plaintiffs); Bower, Cotton & Bower agents for Hallett & Co, Ashford (for the defendant).

K Mydeen Esq Barrister.

TAB 15

Murray Ryan *Appellant*

v.

The Corporation of the City of Victoria, The Esquimalt and Nanaimo Railway Company and Canadian Pacific Limited/Canadien Pacifique Limitée *Respondents*

INDEXED AS: RYAN *v.* VICTORIA (CITY)

File No.: 25704.

1998: June 17; 1999: January 28.

Present: Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Nuisance — Railways — Defence of statutory authority — Railway built embedded in and running down an urban street and all applicable statutes and regulations complied with — Motorcyclist thrown and injured when front tire lodged in gap beside rail — Whether Railways liable in negligence — Whether railways liable in public nuisance.

Courts — Appeal — Trial judge finding no contributory negligence — No palpable and over-riding error — Whether the Court of Appeal erred by reversing trial judge's findings.

The appellant was injured when he was thrown from his motorcycle while attempting to cross railway tracks running down the centre of a street in downtown Victoria. The front tire of his motorcycle became trapped in a "flangeway" gap running alongside the inner edge of the street-grade tracks. The motorcyclist sued the City and the railway companies which owned and operated the tracks. The Railways denied liability on the ground that the tracks were authorized by, and complied with, all applicable statutes, regulations and administrative orders.

Murray Ryan *Appelant*

c.

La Corporation de la Ville de Victoria, la Compagnie du chemin de fer d'Esquimalt à Nanaïmo et Canadian Pacific Limited/Canadien Pacifique Limitée *Intimées*

RÉPERTORIÉ: RYAN *c.* VICTORIA (VILLE)

Nº du greffe: 25704.

1998: 17 juin; 1999: 28 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Responsabilité délictuelle — Négligence — Nuisance — Compagnies ferroviaires — Moyen de défense fondé sur l'autorisation du législateur — Voie ferrée enfoncée dans la chaussée au centre d'une artère urbaine, toutes les dispositions législatives et réglementaires applicables ont été observées — Motocycliste blessé après avoir été projeté de son véhicule, dont le pneu avant s'est coincé dans l'espace le long du rail — Les compagnies ferroviaires sont-elles responsables de négligence? — Les compagnies ferroviaires sont-elles responsables de nuisance publique?

Tribunaux — Appel — Juge de première instance ayant conclu à l'absence de négligence contributive — Absence d'erreur manifeste et dominante — La Cour d'appel a-t-elle commis une erreur en infirmant les conclusions du juge de première instance?

L'appelant s'est blessé après avoir chuté de sa motocyclette en tentant de traverser la voie ferrée qui courait au centre d'une rue du centre-ville de Victoria. Le pneu avant de la motocyclette de l'appelant s'est coincé dans l'espace créé par l'«ornière» courant le long de la face intérieure des rails à niveau avec la chaussée. Le motocycliste a poursuivi la Ville ainsi que les compagnies ferroviaires qui possédaient et exploitaient la voie ferrée. Les compagnies ferroviaires nient toute responsabilité pour le motif que la voie ferrée en cause était autorisée par les lois, règlements et ordonnances administratives applicables et conforme à ceux-ci.

The trial judge held the Railways and the City jointly and severally liable in negligence, the former for maintaining dangerously wide flangeways and the latter for failing to warn of the hazard. In addition, he held the Railways liable in nuisance. The British Columbia Court of Appeal set aside the nuisance finding and held all of the respondents liable only for failure to warn. The Court of Appeal also found the appellant to be contributorily negligent and liable for 50% of his damages.

Le juge de première instance a statué que les compagnies ferroviaires et la Ville étaient solidairement responsables de négligence, les premières pour avoir maintenu des ornières dangereusement larges, et la seconde pour avoir omis de signaler le danger. En outre, il a conclu que les compagnies ferroviaires étaient responsables de nuisance. La Cour d'appel de la Colombie-Britannique a infirmé cette dernière conclusion et déclaré toutes les intimées responsables seulement d'omission de signaler le danger. La Cour d'appel a également conclu que l'appelant était coupable de négligence contributive et que, pour cette raison, il était responsable de la moitié des dommages qu'il avait subis.

At issue here was, first, whether the Railways were liable in negligence. Under a long-standing common law rule, the standard of care owed by railways to the public was normally limited to the discharge of statutory obligations. The question is whether that rule should now be discarded, and if so, how statutory compliance should affect the assessment of liability under ordinary negligence principles. The second issue was whether the Railways were liable in public nuisance. Again, the Railways disclaim liability on the ground that the tracks involved were authorized by statute and regulations. The question arose as to whether that defence was unavailable because the hazard posed by the tracks was not an "inevitable consequence" of exercising statutory authority. The final issue was whether the Court of Appeal erred by reversing the findings of the trial judge with respect to contributory negligence. The finding of liability for failing to warn the appellant of the hazard created by the flangeways was not challenged.

La première question en litige est de savoir si les compagnies ferroviaires sont responsables de négligence. En vertu d'une règle de common law en vigueur depuis longtemps, la norme de diligence à laquelle sont tenues les compagnies ferroviaires à l'égard du public se limite habituellement à l'exécution de leurs obligations légales. Il s'agit de déterminer si cette règle devrait maintenant être abandonnée et, dans l'affirmative, dans quelle mesure le fait que la loi a été observée influe sur l'appréciation de la responsabilité en vertu des principes ordinaires de la négligence. La deuxième question en litige est de savoir si les compagnies ferroviaires sont responsables de nuisance publique. Encore une fois, les compagnies ferroviaires nient toute responsabilité, plaidant que la voie ferrée en cause était autorisée par les lois et règlements applicables. Il s'agit de déterminer si ce moyen de défense ne peut être invoqué parce que le danger que présente la voie ferrée n'est pas une «conséquence inévitable» de l'exercice d'une autorisation du législateur. Enfin, la dernière question en litige consiste à déterminer si la Cour d'appel a commis une erreur en infirmant les conclusions du juge de première instance en ce qui concerne la négligence contributive. Les intimées n'ont pas contesté la conclusion qu'elles étaient responsables d'avoir omis d'avertir l'appelant du danger créé par les ornières.

Held: The appeal should be allowed.

Arrêt: Le pourvoi est accueilli.

A duty of care existed here. Duty of care is determined under the two-step *Anns/Kamloops* test (*Anns v. Merton London Borough Council*, adopted in *Kamloops (City of) v. Nielsen*). Under the first step, the establishment of a *prima facie* duty of care, a relationship of "proximity" must be shown to have existed between the parties such that it was reasonably foreseeable that a careless act by the Railways could result in injury to the appellant. The threshold is a relatively low threshold.

Il existait une obligation de diligence en l'espèce. L'obligation de diligence est déterminée par l'application du critère en deux volets établi dans *Anns c. Merton London Borough Council*, qui a été adopté par notre Cour dans *Kamloops (Ville de) c. Nielsen*. En vertu du premier volet de ce critère, pour établir l'existence *prima facie* d'une obligation de diligence, il faut démontrer qu'il existait entre les parties un lien à ce point «étroit» qu'il était raisonnablement prévisible qu'un

Liability does not necessarily follow the establishment of proximity.

manque de diligence des compagnies ferroviaires pourrait donner lieu aux blessures de l'appelant. Ce critère est relativement peu exigeant. Même dans les cas où le critère du lien étroit est respecté, il n'y a pas nécessairement responsabilité.

Under the second step, it must be determined whether any factors exist which should eliminate or limit the duty found under the first branch of the test. Policy considerations may serve to negate a duty of care entirely or to "limit" the "scope" of an existing duty but they do not give rise to "greater" or "lesser" duties in different cases. A duty of care either exists or it does not. The "scope" of a duty of care can be "limited" under the *Anns/Kamloops* test only in the sense that the duty will arise in certain situations and not in others. The *Anns/Kamloops* test is not concerned with legislative or judicial policies which, as in this case, define the conduct required to meet an existing duty. Such policies relate to the standard of care.

En vertu du deuxième volet, il faut déterminer s'il existe des facteurs qui éliminent ou limitent l'obligation dont l'existence a été établie en application du premier volet du critère. Des considérations de politique générale peuvent écarter complètement une obligation de diligence ou avoir pour effet de «limiter» la «portée» d'une obligation, mais elles ne donnent pas naissance à des obligations «plus grandes» ou «moins grandes» d'une affaire à l'autre. Une obligation de diligence existe ou elle n'existe pas. La «portée» de l'obligation de diligence peut être «limitée» par l'application du critère établi dans les arrêts *Anns* et *Kamloops*, mais seulement en ce sens que certaines situations lui donnent naissance et d'autres non. Ce critère ne s'attache pas à des règles législatives ou judiciaires qui, comme c'est le cas en l'espèce, définissent la conduite à suivre pour satisfaire à une obligation existante. De telles règles sont pertinentes à l'égard de la norme de diligence.

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent.

Une conduite est négligente si elle crée un risque de préjudice objectivement déraisonnable. Pour éviter que sa responsabilité ne soit engagée, une personne doit agir de façon aussi diligente qu'une personne ordinaire, raisonnable et prudente placée dans la même situation. Les normes législatives sont pertinentes à l'égard de la norme de diligence en common law, mais leur portée ne coïncide pas nécessairement. Le fait qu'une loi prescrive ou interdise certaines activités peut contribuer à établir ce qui constitue une conduite raisonnable dans une situation donnée, mais cela n'éteint pas l'obligation sous-jacente d'agir de façon raisonnable. De même, le seul fait que la loi ait été observée n'empêche pas en soi de conclure à la responsabilité civile. Cependant, les normes législatives peuvent être hautement pertinentes pour déterminer ce que constitue une conduite raisonnable dans un cas particulier, et elles peuvent, en fait, rendre raisonnable un acte ou une omission qui, autrement, paraîtrait négligent.

The "special rule" which existed at common law with respect to railways can no longer be justified in principle and should be set aside. Under this rule, a railway, as long as it complied with the requirements imposed upon it by applicable statutes, regulations and administrative orders, was under no further obligation — absent extraordinary circumstances — to act in an objectively

La «règle spéciale» en common law dont les compagnies ferroviaires bénéficient ne peut plus se justifier sur le plan des principes, et le temps est venu de l'écarter. En vertu de cette règle, dans la mesure où elles se conformaient aux obligations leur incombant en application des lois, règlements et ordonnances administratives applicables, les compagnies ferroviaires n'avaient pas

reasonable manner. Its effect was to excuse railway companies in most cases from the ordinary obligation of prudence. The courts in applying this rule implicitly recognized that statutory compliance cannot replace the common law standard of care, and can be accepted as a substitute for that standard only in certain circumstances.

— en l'absence de circonstances extraordinaires — d'autre obligation que celle d'agir d'une manière objectivement raisonnable. L'effet de la règle est que les compagnies ferroviaires étaient, dans la plupart des cas, soustraites à l'obligation ordinaire de prudence. Lorsqu'ils ont appliqué cette règle, les tribunaux ont implicitement reconnu que l'observation de la loi ne pouvait remplacer la norme de diligence prévue par la common law, et qu'elle ne pouvait être substituée à cette dernière que dans certaines circonstances.

With the abolishment of the special rule, the correct principles can be stated more clearly. Compliance with a statutory standard of care does not abrogate or supersede the obligation to comply with the common law standard of care. The requirements are concurrent, and each carries its own penalty for breach. However, in appropriate circumstances, compliance with statutory standards may entirely satisfy the common law standard of care and thus absolve a defendant of liability in negligence.

L'abolition de la règle spéciale permet d'énoncer plus clairement les principes qu'il convient d'appliquer. L'observation d'une norme de diligence d'origine législative n'a pas pour effet d'abroger ni ne remplacer l'obligation de respecter la norme de diligence prévue par la common law. Il s'agit d'obligations concomitantes, comportant chacune sa propre sanction en cas de manquement. Toutefois, il est possible que, dans des circonstances appropriées, l'observation de normes législatives satisfasse entièrement à la norme de diligence prévue par la common law et dégage donc le défendeur de toute responsabilité fondée sur la négligence.

The weight to be accorded to statutory compliance in the overall assessment of reasonableness depends on the nature of the statute and the circumstances of the case. It should be determined whether the legislative standards are necessarily applicable to the facts of the case. Statutory compliance will have more relevance in "ordinary" cases — cases clearly within the intended scope of the statute — than in cases involving special or unusual circumstances. It should also be determined whether the legislative standards are specific or general, and whether they allow for discretion in the manner of performance. A party acting under statutory authority must still take such precautions as are reasonable within the range of that authority to minimize the risks which may result from its actions.

Le poids qu'il convient d'accorder à l'observation de la loi dans l'appréciation globale du caractère raisonnable des mesures prises dépend de la nature de la loi en cause et des circonstances de l'affaire. Il faut déterminer si les normes législatives s'appliquent nécessairement aux faits de l'affaire. L'observation de la loi sera un élément plus pertinent dans les affaires «ordinaires» — les affaires qui relèvent clairement du champ d'application visé par la loi — que dans celles comportant des circonstances spéciales ou inhabituelles. Il faut également déterminer si les normes législatives sont de nature particulière ou générale, et si elles accordent un certain pouvoir discrétionnaire quant aux modalités d'exécution. La partie qui agit en vertu d'une autorisation du législateur doit néanmoins prendre les précautions raisonnables dans les limites de cette autorisation afin de réduire au minimum les risques susceptibles de résulter de ses actes.

Where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required. By contrast, where a statute is general or permits discretion as to the manner of performance, or where unusual circumstances exist which are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care. This approach strikes an appropriate

Lorsqu'une loi autorise certaines activités et définit strictement les modalités d'exécution qui doivent être suivies et les précautions qui doivent être prises, il est probable que l'on conclue que l'observation de cette loi vaut diligence raisonnable et qu'aucune autre mesure supplémentaire n'est requise. Par contraste, lorsqu'il s'agit d'une loi de nature générale ou qui accorde un certain pouvoir discrétionnaire quant aux modalités d'exécution, ou lorsqu'il existe des circonstances inhabituelles qui ne relèvent pas clairement du champ d'ap-

balance among several important policies, including deference to legislative determinations on matters of railway safety, security for railways which comply with prescribed standards, and protection for those who may be injured as a result of unreasonable choices made by railways in the exercise of official authority.

plication de la loi, il est peu probable que la simple observation de celle-ci satisfasse à la norme de diligence applicable. Cette approche établit un juste équilibre entre plusieurs principes importants, notamment le respect des décisions du législateur en matière de sécurité ferroviaire, la protection des entreprises ferroviaires qui satisfont aux normes prescrites et la protection des personnes qui subissent un préjudice résultant de choix déraisonnables faits par ces entreprises dans l'exercice d'une autorisation officielle.

The Railways' compliance with the statutory and regulatory authorities did not exhaust the requisite standard of care in this case, for two reasons. First, those authorities were not directly applicable to the circumstances, and second, they allowed for significant discretion in the manner of performance.

Le fait que les compagnies ferroviaires se soient conformées aux lois et règlements applicables n'a pas satisfait à l'obligation de diligence applicable en l'espèce, et ce pour deux raisons. Premièrement, ces textes ne s'appliquaient pas directement aux circonstances de l'espèce et, deuxièmement, ils accordaient un pouvoir discrétionnaire appréciable à l'égard des modalités d'exécution.

The common law standard of care is presumed to apply. A regulatory standard, if shown to be clearly applicable, may be accepted as a reasonable substitute. Here, the railways relied on authorities which applied to "highway crossings". The branch line, however, was not a crossing in the ordinary sense of the railway and highway intersecting at one point but rather it ran down the centre of the street. Important differences exist between the two situations. In particular, the danger posed to two-wheeled traffic is much greater in the second. A regulatory standard applying to a railway crossing cutting across traffic at a right angle may be wholly inappropriate to a railway branch running down the street. The regulatory standards were accordingly not definitive of the standard of care.

La norme de diligence prévue par la common law est réputée s'appliquer. S'il est clairement établi qu'une norme réglementaire régit une situation particulière, elle peut être considérée comme une solution de rechange raisonnable. En l'espèce, les textes invoqués par les compagnies ferroviaires s'appliquent aux «croisements de voies publiques». La ligne secondaire en cause, cependant, n'était pas un croisement au sens ordinaire de ce terme, qui désigne l'intersection d'une voie ferrée et d'une voie publique en un point donné, mais plutôt une portion de voie ferrée courant au centre d'une rue. Il existe des différences importantes entre ces deux situations. En particulier, le danger que la deuxième situation présente pour les véhicules à deux roues est beaucoup plus grand. Il est possible qu'une norme réglementaire applicable à une voie ferrée qui coupe la circulation à angle droit ne convienne pas du tout à une voie ferrée qui court au centre d'une rue. Les normes réglementaires ne sauraient, en conséquence, définir la norme de diligence applicable en l'espèce.

Even if highway crossing regulatory standards were applicable, the Railways' compliance with those standards did not necessarily constitute reasonable conduct in the circumstances. The regulations allowed a significant range as to flangeway width and the railways exercised their discretion as to the flangeway width within that range. In exercising that discretion, they were bound by the common law and were required to take all reasonable steps to minimize foreseeable harm. The entire range could not be presumed to be reasonably safe in all conditions. The decision to use a wider flangeway width within the limits allowed by regulation raised an issue of reasonableness, not of regulatory compliance. The trial judge's conclusion was consistent with the correct prin-

Même si les normes réglementaires régissant les croisements d'une route et d'une voie ferrée s'appliquaient, l'observation de ces normes par les compagnies ferroviaires ne constituait pas nécessairement une conduite raisonnable dans les circonstances. Le règlement applicable prévoyait une fourchette considérable pour ce qui était de la largeur des ornières, et la décision de construire une ornière dont la largeur se situait entre le minimum et le maximum permis était laissée à la discrétion des compagnies ferroviaires. En exerçant ce pouvoir discrétionnaire, les compagnies ferroviaires étaient liées par les règles de la common law et elles devaient prendre toutes les mesures raisonnables afin de réduire au minimum le risque qu'un préjudice prévisible survienne.

ciples of law, and it should not have been disturbed by the Court of Appeal.

Il était impossible de présumer que toutes les largeurs comprises dans cette fourchette étaient raisonnablement sécuritaires dans toutes les circonstances. La décision des compagnies ferroviaires de construire une ornière plus large, quoique respectant les limites prescrites par le règlement, soulève la question du caractère raisonnable de leur conduite et non d'observation de la réglementation. La conclusion du juge de première instance était compatible avec les principes de droit applicables et n'aurait pas dû être infirmée par la Cour d'appel.

A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience. Whether a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood. Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result or consequence" of exercising that authority. Here, the Railways' decisions, (i) to exceed the minimum flangeway width and (ii) not to install flange fillers, were a matter of discretion and not the "inevitable result" or "inseparable consequence" of complying with the regulations.

La nuisance publique a été définie comme étant toute activité qui porte atteinte de façon déraisonnable à l'intérêt du public relativement à des questions de santé, sécurité, moralité, confort ou commodité. La question de savoir si une activité particulière constitue une nuisance publique est une question de fait. De nombreux facteurs peuvent être considérés, notamment l'inconvénient causé par l'activité, la difficulté à diminuer ou éliminer le risque, l'utilité de l'activité, la pratique généralement suivie en la matière ailleurs et la nature du voisinage. L'autorisation du législateur fournit, au mieux, un moyen de défense limité contre la nuisance. Suivant la règle traditionnelle, le défendeur ne sera pas jugé responsable si l'activité en cause est autorisée par une loi et s'il établit que la nuisance est [TRADUCTION] «le résultat ou la conséquence inévitable» de l'exercice de cette autorisation. En l'espèce, la décision des compagnies ferroviaires (i) d'aménager des ornières dont la largeur dépassait la largeur minimale et (ii) de ne pas utiliser d'entretoises d'ornières relevait de l'exercice d'un pouvoir discrétionnaire et n'était pas un «résultat inévitable» ou une «conséquence indissociable» de l'observation des dispositions réglementaires applicables.

While findings of fact with regard to the allocation of fault are not immutable, they should not be reversed by an appellate court unless it can be established that the trial judge made some palpable and overriding error which affected his or her assessment of those findings. No such errors were made by the trial judge, and the Court of Appeal ought not to have interfered with his findings on the issue of contributory negligence.

Bien qu'elles ne soient pas intangibles, les conclusions de fait à l'égard de l'imputation de la faute ne doivent pas être modifiées par une cour d'appel à moins qu'il ne soit établi que le juge du procès a commis une erreur manifeste et dominante ayant faussé son appréciation des faits. Aucune erreur de la sorte n'a été commise par le juge de première instance, et la Cour d'appel n'aurait pas dû infirmer les conclusions de ce dernier sur la question de la négligence contributive.

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APPEAL from a judgment of the British Columbia Court of Appeal (1996), 82 B.C.A.C. 40, 133 W.A.C. 40, 36 M.P.L.R. (2d) 35, 22 M.V.R. (3d) 1, [1996] B.C.J. No. 2083 (QL), allowing an appeal in part from a judgment of Owen-Flood J. (1994), 21 M.P.L.R. (2d) 148, 4 M.V.R. (3d) 59, [1994] B.C.J. No. 1202 (QL). Appeal allowed.

Joseph J. Arvay, Q.C., and *Aaron A. G. Gordon*, for the appellant.

Richard R. Sugden, Q.C., and *Craig P. Dennis*, for the respondent The Corporation of the City of Victoria.

William M. Everett, Q.C., and *W. S. MacFarlane*, for the respondents The Esquimalt and Nanaimo Railway Company and Canadian Pacific Limited/Canadien Pacifique Limitée.

The judgment of the Court was delivered by

1 MAJOR J. — This appeal considers the effect of statutory authority on the civil liability of railways. A motorcyclist was injured while attempting to cross railway tracks located on an urban street in Victoria, British Columbia. The motorcyclist sued the City of Victoria ("the City") and the railway companies which owned and operated the tracks ("the Railways"). The Railways denied liability on the ground that the tracks were authorized by, and complied with, all applicable statutes, regulations and administrative orders.

2 The first issue is whether the Railways are liable in negligence. Under a long-standing common law rule, the standard of care owed by railways to the public was normally limited to the discharge of statutory obligations. The question is whether that rule should now be discarded, and if so, how statutory compliance should affect the assessment of liability under ordinary negligence principles.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1996), 82 B.C.A.C. 40, 133 W.A.C. 40, 36 M.P.L.R. (2d) 35, 22 M.V.R. (3d) 1, [1996] B.C.J. No. 2083 (QL), qui a accueilli en partie l'appel formé contre un jugement du juge Owen-Flood (1994), 21 M.P.L.R. (2d) 148, 4 M.V.R. (3d) 59, [1994] B.C.J. No. 1202 (QL). Pourvoi accueilli.

Joseph J. Arvay, c.r., et *Aaron A. G. Gordon*, pour l'appelant.

Richard R. Sugden, c.r., et *Craig P. Dennis*, pour l'intimée la Ville de Victoria.

William M. Everett, c.r., et *W. S. MacFarlane*, pour les intimées la Compagnie du chemin de fer d'Esquimalt à Nanaïmo et Canadian Pacific Limited/Canadien Pacifique Limitée.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR — Le présent pourvoi porte sur l'effet de l'autorisation du législateur sur la responsabilité civile des entreprises ferroviaires. Un motocycliste s'est blessé en tentant de franchir une voie ferrée qui occupait le centre d'une artère urbaine à Victoria (Colombie-Britannique). Le motocycliste a poursuivi la Ville de Victoria (la «Ville») ainsi que les compagnies ferroviaires qui possédaient et exploitaient la voie ferrée (les «compagnies ferroviaires»). Les compagnies ferroviaires soutiennent que leur responsabilité n'est pas engagée, étant donné que la voie ferrée en cause était autorisée par les lois, règlements et ordonnances administratives applicables et qu'elle était conforme à ceux-ci.

La première question en litige est de savoir si les compagnies ferroviaires sont responsables de négligence. En vertu d'une règle de common law en vigueur depuis longtemps, la norme de diligence à laquelle sont tenues les compagnies ferroviaires à l'égard du public se limite habituellement à l'exécution de leurs obligations légales. Il s'agit de déterminer si cette règle devrait maintenant être abandonnée et, dans l'affirmative, dans quelle

mesure le fait que la loi a été respectée influe sur l'appréciation de la responsabilité en vertu des principes ordinaires de la négligence.

The second issue is whether the Railways are liable in public nuisance. Again, the Railways disclaim liability on the ground that the tracks involved were authorized by statute and regulations. The appellant submits that such a defence is unavailable because the hazard posed by the tracks was not an "inevitable consequence" of exercising statutory authority. The final issue is whether the Court of Appeal erred by reversing the findings of the trial judge with respect to contributory negligence.

3 La deuxième question en litige est de savoir si les compagnies ferroviaires sont responsables de nuisance publique. Encore une fois, les compagnies ferroviaires nient toute responsabilité, plaidant que la voie ferrée en cause était autorisée par les lois et règlements applicables. L'appelant soutient que ce moyen de défense ne peut être invoqué, parce que le danger que présente la voie ferrée n'est pas une «conséquence inévitable» de l'exercice d'une autorisation du législateur. Enfin, la dernière question en litige consiste à déterminer si la Cour d'appel a commis une erreur en infirmant les conclusions du juge de première instance en ce qui concerne la négligence contributive.

I. Facts

I. Les faits

4 On May 4, 1987, the appellant, Murray Ryan, was thrown from his motorcycle while attempting to cross railway tracks running down the centre of Store Street, in downtown Victoria. The tracks were owned by the respondent Esquimalt & Nanaimo Railway Company ("E&N"), and were leased and operated by the respondent Canadian Pacific Limited ("CP"). The accident occurred when the front tire of the appellant's motorcycle became trapped in a "flangeway" gap running alongside the inner edge of the tracks. At the time of the accident, the flangeways on Store Street were approximately one-quarter of an inch wider than the front tire of the appellant's motorcycle.

Le 4 mai 1987, l'appelant, Murray Ryan, a chuté de sa motocyclette en tentant de traverser la voie ferrée qui court au milieu de la rue Store, au centre-ville de Victoria. La voie ferrée, qui appartenait à la Compagnie du chemin de fer d'Esquimalt à Nanaïmo intimée («E&N»), était louée et exploitée par l'intimée Canadien Pacifique Limitée («CP»). L'accident s'est produit lorsque le pneu avant de la motocyclette de l'appelant s'est coincé dans l'«ornière» courant le long de la face intérieure de la voie ferrée. Lorsque l'accident s'est produit, la largeur des ornières de la voie ferrée dans la rue Store était environ un quart de pouce supérieure à celle du pneu avant de la motocyclette de l'appelant.

A. *History and Location of the Store Street Tracks*

A. *L'historique et l'emplacement de la voie ferrée de la rue Store*

5 In 1907, E&N applied to the Board of Railway Commissioners of Canada (the "Board") for permission to construct a branch line along a portion of Store Street. E&N submitted a "plan, profile and book of reference" to the Board, setting forth the specifications of the proposed tracks, pursuant to s. 222 of the *Railway Act*, R.S.C. 1906, c. 37 ("*1906 Railway Act*"). In addition, E&N entered into an agreement with the City regarding the

En 1907, E&N a demandé à la Commission des chemins de fer du Canada (la «Commission») la permission de construire une ligne secondaire dans une partie de la rue Store. Au soutien de sa demande, E&N a soumis à la Commission un «plan, un profil et [. . .] un livre de renvoi», faisant état des devis de la voie ferrée projetée, conformément à l'art. 222 de la *Loi des chemins de fer*, S.R.C. 1906, ch. 37 («*Loi sur les chemins de fer de*

maintenance and operation of the line; the terms of that agreement were subsequently passed into municipal law. On March 6, 1908, in accordance with s. 223 of the *1906 Railway Act*, the Board issued Order No. 4421 authorizing the construction of the tracks.

1906»). En outre, E&N a conclu avec la Ville une entente concernant l'entretien et l'exploitation de la ligne; les modalités de cette entente ont été ultérieurement adoptées en tant que règles de droit municipal. Le 6 mars 1908, conformément à l'art. 223 de la *Loi sur les chemins de fer de 1906*, la Commission a pris l'Ordonnance nº 4421 autorisant la construction de la voie ferrée.

6 E&N leased its railway operations to CP in July of 1912. By 1926 it came to CP's attention that a discrepancy existed between the terms of the 1908 Order and the actual location of the Store Street tracks. In particular, the original plans did not specify that the tracks would cross through traffic on Chatham Street, a side road which intersects Store Street near one end of the tracks. CP applied to the Board for a revised authorization of the tracks as constructed. On January 18, 1927, the Board issued Order No. 38682, endorsing the existing location of the tracks with specific reference to the Chatham Street crossing. That order provided:

> THE BOARD ORDERS that the Applicant Company be, and it is hereby, authorized to revise the location of its branch line of railway from a point on its right of way at the easterly limit of Johnson Street Bridge, thence north-easterly and northerly along Store Street, across Chatham Street, to and into Block D, in the City of Victoria and Province of British Columbia, as shown on the said plan and profile on file with the Board under case No. 2717; the crossing of Chatham Street to be constructed in accordance with "The Standard Regulations of the Board Affecting Highway Crossings, as amended May 4th, 1910."

Track reconstructions were undertaken in 1944 and 1982, but as those projects did not significantly alter the location of the tracks, no further orders were obtained from the Board. Rail traffic on the Store Street tracks declined steadily over the years and the tracks were removed in 1993.

E&N a loué ses opérations ferroviaires au CP en juillet 1912. En 1926, CP a constaté l'existence d'une divergence entre les termes de l'ordonnance de 1908 et l'emplacement de la voie ferrée dans la rue Store. En particulier, les plans originaux ne précisaient pas que la voie ferrée traverserait la circulation sur la rue Chatham, rue secondaire qui croise la rue Store près de l'une des extrémités de la voie ferrée. CP a demandé à la Commission une autorisation révisée à l'égard de la voie ferrée telle qu'elle avait été construite. Le 18 janvier 1927, la Commission a pris l'Ordonnance nº 38682, qui sanctionnait l'emplacement de la voie ferrée et faisait expressément mention du croisement de la rue Chatham. Cette ordonnance prévoyait ceci:

> [TRADUCTION] LA COMMISSION ORDONNE que la compagnie requérante soit autorisée à réviser l'emplacement de sa ligne secondaire depuis un point de son emprise ferroviaire situé à l'extrémité est du Pont de la rue Johnson et, de là, en direction nord-est et nord le long de la rue Store, au-delà de la rue Chatham, jusqu'à l'intérieur du pâté de maisons D, dans la Ville de Victoria, province de la Colombie-Britannique, comme l'indiquent les plan et profil déposés à la Commission dans le dossier nº 2717; le croisement de la rue Chatham devra être construit conformément au «Standard Regulations of the Board Affecting Highway Crossings, as amended May 4th, 1910».

La voie ferrée a fait l'objet de travaux de reconstruction en 1944 et en 1982, mais comme ces travaux n'ont pas changé de façon importante son emplacement, aucune autre ordonnance n'a été prise par la Commission. L'utilisation de la voie ferrée de la rue Store a diminué progressivement au fil des années, jusqu'à ce qu'on l'enlève en 1993.

B. *Dimensions of the Flangeways on Store Street*

B. *Les dimensions des ornières de passage de la voie ferrée de la rue Store*

When railway tracks run across a street or highway at grade, the rails are normally embedded in the pavement so as not to impede traffic. A groove called a "flangeway" is installed alongside the tracks in order to prevent derailments while permitting the running rails to remain flush with the road surface. The most durable and inexpensive way to construct flangeways is to lay scrap rail, or "flangerail", on its side next to the running rail to create a gap between the track and the surrounding pavement or planking. This process was approved by the Board in Order No. 9729 (February 29, 1910) as the standard design for CP highway crossings, and it has remained the accepted method of constructing flangeways in Canada for many years.

7 Aux passages à niveau d'une voie ferrée et d'une voie publique, les rails sont habituellement enfoncés dans la chaussée afin de ne pas nuire à la circulation. On aménage alors, le long des rails, une rainure appelée «ornière» qui vise à prévenir les déraillements, tout en permettant aux rails d'être au même niveau que la surface de la route. La façon la plus durable et la moins dispendieuse de construire ces ornières consiste à placer de côté des rails de rebut ou «rails à ornières» le long des rails de la voie, de façon à créer un espace entre les rails et la chaussée ou le planchéiage qui les borde. Cette méthode a été approuvée par la Commission, dans son Ordonnance nº 9729 (29 février 1910), comme aménagement type des passages à niveau du CP, et est demeurée la méthode acceptée de construction des ornières au Canada pendant de nombreuses années.

Regulations issued by the Canadian Transport Commission in 1965 and 1980 provide that flangeways at "crossings" may be anywhere from 2.5 to 4.75 inches wide. The same dimensions are adopted in CP's own Standard Practice Circular 29. It is common ground that the flangeways on Store Street have always remained within that prescribed range. From 1944 to 1982, the flangeways were between 2.75 and 3.25 inches wide. During the 1982 reconstruction, the existing flangerail was torn out and replaced with heavier-gauge flangerail on its side; as a result, the flangeways were enlarged to a width of between 3.75 and 3.94 inches.

8 Aux termes de règlements pris par la Commission canadienne des transports en 1965 et en 1980, la largeur des ornières aux «passages à niveau» peut varier de 2,5 à 4,75 pouces. Les mêmes dimensions ont été adoptées par le CP dans sa propre notice technique nº 29. Il est admis que la largeur des ornières de la rue Store a toujours respecté cette fourchette. De 1944 à 1982, la largeur des ornières a varié de 2,75 à 3,25 pouces. Lors des travaux de reconstruction de 1982, les anciens rails à ornières ont été remplacés par des rails à ornières de gabarit supérieur placés eux aussi de côté. La largeur des nouvelles ornières variait de 3,75 à 3,94 pouces.

Despite arguments to the contrary by the respondents, the trial judge found that at the time of the appellant's accident, methods and technologies were available which, if employed, could have eliminated the flangeway gaps on Store Street entirely, or reduced them to the minimum width — 2.5 inches — required under the "crossings" regulations. Those methods included the use of rubber-type "flange-fillers", which are inserted into a flangeway to create an even surface for road traffic while compressing under the weight of train wheels. In particular, the trial judge found that the flange filler "Epflex" was available in 1982 and

9 Malgré les arguments à l'effet contraire présentés par les intimées, le juge de première instance a conclu qu'à l'époque où est survenu l'accident de l'appelant, il existait des méthodes et technologies qui auraient permis d'éliminer complètement les sillons formés par les ornières de la rue Store ou de les réduire à la largeur minimale — 2,5 pouces — prescrite par le règlement «sur les passages à niveau». Une de ces méthodes consistait à insérer dans l'ornière une pièce de caoutchouc qui crée une surface égale pour la circulation routière tout en se comprimant sous le poids des roues des trains. En particulier, le juge de pre-

was in use in Waterloo, Ontario on tracks which, as here, ran down the centre of an urban street.

C. *The Accident*

10 Store Street is located in a mixed use area near Victoria Harbour. It is a two-way street with one lane of traffic running in each direction. The railway tracks ran down the middle of the street for approximately four blocks, meandering slowly from one traffic lane to the other in a lazy S-shape. Posted signs warned of a hazard to bicyclists but not to motorcyclists.

11 The appellant entered Store Street on his motorcycle from a side road. Cars were parked on the opposite side of the street, approximately six feet from the tracks. The appellant did not cross the tracks immediately but instead travelled down the centre of Store Street for about two blocks, keeping the tracks on his right. When the meandering of the tracks edged him to his left and into the path of oncoming traffic, he attempted to cross the tracks to the other side of the street. He was moving at about 20-25 kilometres per hour and encountered the tracks at a shallow angle. As he crossed, the front tire of his motorcycle, which was three and one-half inches wide at its perimeter, fell into the flangeway and became wedged there. The motorcycle rotated over the top of the trapped tire, and the appellant was thrown forward and injured. The record confirms that six prior accidents involving the flangeways on Store Street — five of which also involved motorcycles — were reported to the Railways or the City of Victoria between 1982 and 1986.

12 Following a lengthy trial, the British Columbia Supreme Court held the Railways and the City jointly and severally liable in negligence, the former for maintaining dangerously wide flangeways and the latter for failing to warn of the hazard. In addition, the trial judge held the Railways liable in nuisance. The British Columbia Court of Appeal

mière instance a conclu que l'entretoise d'ornière «Epflex» était disponible en 1982 et était utilisée à Waterloo (Ontario), où une voie ferrée occupait, comme en l'espèce, le centre d'une artère urbaine.

C. *L'accident*

La rue Store est située dans un quartier à fonctions multiples, près du port de Victoria. Il s'agit d'une rue à deux sens. La voie ferrée occupait le centre de la rue sur une distance d'environ quatre pâtés de maisons, serpentant lentement d'une voie à l'autre en forme de «S». Des panneaux avertissaient les cyclistes du danger, mais non les motocyclistes.

L'appelant a accédé à la rue Store sur sa motocyclette par une rue secondaire. Des voitures étaient stationnées de l'autre côté de la rue, à environ six pieds de la voie ferrée. L'appelant n'a pas franchi immédiatement la voie ferrée; il a plutôt roulé au centre de la rue Store, sur une distance d'environ deux pâtés de maisons, la voie ferrée se trouvant à sa droite. Lorsque les ondulations de la voie ferrée l'ont forcé à serrer sa gauche et à rouler sur la voie réservée aux véhicules circulant en sens inverse, il a tenté de franchir les rails pour se rendre sur l'autre voie. Il roulait à environ 20 ou 25 kilomètres à l'heure lorsqu'il s'est apprêté à franchir la voie ferrée, à un angle très faible. Comme il la franchissait, le pneu avant de sa motocyclette, large de trois pouces et demi à son périmètre, est tombée dans l'ornière et y est demeurée coincée. La motocyclette a alors basculé par-dessus la roue avant coincée et l'appelant a été projeté en avant, subissant des blessures. Le dossier confirme que six autres accidents mettant en cause les ornières de la voie ferrée de la rue Store — dont cinq accidents de motocyclette — avaient déjà été signalés aux compagnies ferroviaires ou à la Ville de Victoria, entre 1982 et 1986.

À la suite d'un long procès, la Cour suprême de la Colombie-Britannique a statué que les compagnies ferroviaires et la Ville étaient solidairement responsables de négligence, les premières pour avoir maintenu des ornières dangereusement larges, et la seconde pour avoir omis de signaler le danger. En outre, le juge de première instance a

set aside the nuisance finding and held all of the respondents liable only for failure to warn. The Court of Appeal also found the appellant to be contributorily negligent and liable for 50% of his damages.

conclu que les compagnies ferroviaires étaient responsables de nuisance. La Cour d'appel de la Colombie-Britannique a infirmé cette dernière conclusion et déclaré toutes les intimées responsables seulement d'omission de signaler le danger. La Cour d'appel a également conclu que l'appelant était coupable de négligence contributive et que, pour cette raison, il était responsable de la moitié des dommages qu'il avait subis.

II. Relevant Statutory and Regulatory Provisions

II. Les dispositions législatives et réglementaires pertinentes

One issue is whether the Store Street tracks constitute a "highway crossing" within the meaning of the *Railway Act* and applicable regulations; this is relevant as there are specific and different regulations for crossings as opposed to a rail line. Section 235 of the *1906 Railway Act* provides:

L'une des questions litigieuses est de savoir si la voie ferrée de la rue Store constitue un «croisement de voie publique» («*highway crossing*») au sens de la *Loi sur les chemins de fer* et des dispositions réglementaires applicables; il s'agit d'une question pertinente, car il existe des dispositions réglementaires s'appliquant de façon particulière aux croisements plutôt qu'aux voies ferrées. L'article 235 de la *Loi sur les chemins de fer de 1906* prévoit ceci: 13

Highway Crossings

235. The railway may be carried upon, along or across an existing highway. . . .

Croisements de voies publiques

235. Le chemin de fer peut passer sur le parcours, le long ou en travers d'une voie publique existante. . . .

That language is adopted in all subsequent versions of the Act, including s. 196(1) of the *Railway Act*, R.S.C. 1970, c. R-2. A "crossing" is also defined in s. 2 of the *Railway-Highway Crossing at Grade Regulations*, SOR/80-748 ("CTC 1980-8 Rail"), and in s. 1(3) of General Order No. E-4: *Standard Regulations Respecting the Construction of Crossings at Grade*, 55 B.T.C. III, (Feb. 1, 1965) ("General Order No. E-4"), as follows:

Ce texte a été repris dans les versions ultérieures de la Loi, y compris au par. 196(1) de la *Loi sur les chemins de fer*, S.R.C. 1970, ch. R-2. Les mots «passage» ou «croisement» («*crossing*») sont également définis à l'art. 2 du *Règlement sur les passages à niveau au croisement d'un chemin de fer et d'une voie publique*, DORS/80-748 («CCT 1980-8 RAIL»), ainsi qu'au par. 1(3) de l'Ordonnance générale nº E-4: *Règlement général concernant la construction d'un passage à niveau au croisement d'une route et d'une voie ferrée*, 55 B.T.C. III, (1er fév. 1965) («Ordonnance générale nº E-4»), qui est ainsi rédigé:

"Crossing" means any railway crossing of a highway at grade or any highway crossing of a railway at grade.

[TRADUCTION]
«passage» désigne tout croisement à niveau d'une route par une voie ferrée et tout croisement à niveau d'une voie ferrée par une route;

The minimum and maximum dimensions permitted for flangeways at a "crossing" are in s. 6 of General Order No. E-4:

Les dimensions minimale et maximale permises des ornières aux «croisements» ou «passages» sont les suivantes à l'art. 6 de l'Ordonnance générale nº E-4:

6. A space not more than three inches deep and not less than two and one-half inches wide nor more than four and three-quarters inches wide shall be provided between the gauge side of the running rail and the planking and/or other road surface, as the case may be.

A similar requirement appears in metric form in s. 7 of CTC 1980-8 Rail, which replaced General Order No. E-4 and was in force when the Store Street tracks were reconstructed in 1982. That section provides:

7. A flangeway with a width of between 65 mm and 120 mm to a depth of between 50 mm and 75 mm shall be provided between the gauge side of the running rail and the highway surface.

14 The relationship between statutory compliance and civil or criminal liability is addressed generally in s. 367(4) of the *Railway Act*, R.S.C., 1985, c. R-3, as am. R.S.C., 1985, c. 32 (4th Supp.), s. 110 (formerly R.S.C. 1970, c. R-2, s. 342(4)):

367. . . .

(4) No inspection under or by the authority of this Act or the *Railway Safety Act*, and nothing in this Act or the *Railway Safety Act* and nothing done, ordered, directed, required or provided for, or omitted to be done, ordered, directed, required or provided for, under or by virtue of this Act or the *Railway Safety Act*, shall, except in so far as a compliance with the Act in question or with the order, direction, requirement or provision, constitutes a justification for what would otherwise be wrongful, relieve, or be construed to relieve, any company of or from, or in any way diminish or affect, any liability or responsibility resting on it by law, either toward Her Majesty or toward any person, or the wife, husband, parent, child, executor, administrator, tutor, curator, heir or personal representative, of any person, for anything done or omitted to be done by that company, or for any wrongful act, negligence, default, misfeasance, malfeasance or nonfeasance of that company.

III. Judicial History

[TRADUCTION] 6. Un espace d'au plus trois pouces de profondeur sur une largeur d'au moins deux pouces et demi et d'au plus quatre pouces et trois-quarts sera ménagé entre la face intérieure du rail de roulement et le planchéiage et/ou autre revêtement, selon le cas.

Une exigence similaire est formulée en unités métriques à l'art. 7 du CCT 1980-8 RAIL, qui a remplacé l'Ordonnance générale nº E-4 et qui était en vigueur au moment de la reconstruction de la voie ferrée de la rue Store en 1982. Cet article est ainsi rédigé:

7. Une ornière de passage des boudins d'une largeur de 65 mm à 120 mm et d'une profondeur de 50 mm à 75 mm doit être ménagée entre la face intérieure du rail de roulement et la surface de la voie publique.

Le lien entre le principe de l'observation de la loi et la responsabilité civile ou criminelle est abordé de façon générale au par. 367(4) de la *Loi sur les chemins de fer*, L.R.C. (1985), ch. R-3, mod. par L.R.C. (1985), ch. 32 (4e suppl.), art. 110 (auparavant S.R.C. 1970, ch. R-2, par. 342(4)):

367. . . .

(4) Nulle inspection faite sous le régime ou sous l'autorité de la présente loi ou de la *Loi sur la sécurité ferroviaire* et rien de contenu dans l'une ou l'autre de ces lois, et rien de ce qui a été fait, ordonné ou commandé, ou exigé ou prescrit, non plus que nulle omission de faire, d'ordonner ou de commander, d'exiger ou de prescrire, en conformité avec ces lois ou en vertu de celles-ci, sauf en tant que l'observation de la loi ou de quelque ordonnance, ordre, prescription ou disposition constitue une justification de ce qui autrement serait répréhensible, ne soustrait ni ne peut être interprété de façon à soustraire une compagnie à quelque obligation ou responsabilité que la loi lui impose, ni de façon à amoindrir ou atteindre de quelque manière cette obligation ou responsabilité, soit envers Sa Majesté, soit envers une personne, ou l'épouse ou l'époux, le père et la mère ou l'enfant, l'exécuteur testamentaire ou l'administrateur, le tuteur ou le curateur, l'héritier ou le représentant d'une personne, par suite de quelque action ou omission de la part de cette compagnie, ou pour quelque tort, négligence ou défaut, abus d'autorité, acte illégal ou non-exécution de la part de cette compagnie.

III. L'historique judiciaire

A. *British Columbia Supreme Court* (1994), 21 M.P.L.R. (2d) 148 (Owen-Flood J.)

The trial judge relied on *Paskivski v. Canadian Pacific Ltd.*, [1976] 1 S.C.R. 687, for the principle that absent "special or exceptional circumstances", railway companies cannot be found negligent as long as they comply with the *Railway Act* and with orders or regulations issued under that Act. However, he held that the crucial issue in this case — the width of the flangeways on store street — was not governed by any relevant statute or regulation, and in particular was not covered by the regulatory standards which apply to "highway crossings". In the alternative, he found that "special or exceptional circumstances" existed which required the Railways to exceed the precautions mandated in those regulations. He concluded that the Railways were negligent in failing to build the flangeways at the minimum allowable width or with some form of flange filler.

The trial judge also held that the Railways were liable in public nuisance. Relying on *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, he rejected the Railways' defence of "statutory authority" since, in his view, the hazard created was not an inevitable consequence of discharging any statutory duty. The trial judge also held that the City of Victoria was liable for its failure to provide adequate warnings to the public of the danger on Store Street. He dismissed a nuisance claim against the City on the basis that the City had no property interest in the tracks. Finally, he held that the appellant was not contributorily negligent, since his decision to cross the tracks when and where he did was dictated by circumstances beyond his control and was made in "the agony of the moment". Because the trial judge could not ascribe degrees of fault to the various respondents, he apportioned liability equally among them.

A. *Cour suprême de la Colombie-Britannique* (1994), 21 M.P.L.R. (2d) 148 (le juge Owen-Flood)

15 Le juge de première instance s'est fondé sur l'arrêt *Paskivski c. Canadien Pacifique Ltée*, [1976] 1 R.C.S. 687, qui pose le principe selon lequel, sauf s'il existe des «circonstances spéciales ou exceptionnelles», les compagnies ferroviaires ne sauraient être jugées négligentes si elles observent la *Loi sur les chemins de fer* et les ordonnances ou règlements pris en vertu de celle-ci. Cependant, il a statué que la question cruciale en l'espèce, soit la largeur des ornières de la voie ferrée de la rue Store, n'était pas régie par quelque loi ou règlement pertinent et, plus particulièrement, qu'elle n'était pas visée par les normes réglementaires applicables aux «croisements de voies publiques». Subsidiairement, il a conclu à l'existence de «circonstances spéciales ou exceptionnelles» qui obligeaient les compagnies ferroviaires à prendre des précautions supérieures à celles requises par les dispositions réglementaires. Il a statué que les compagnies ferroviaires avaient été négligentes en ne construisant pas des ornières ayant la largeur minimale permise, ou en n'utilisant pas d'entretoises d'ornières.

16 Le juge de première instance a également conclu que les compagnies ferroviaires étaient responsables de nuisance publique. Se fondant sur l'arrêt *Tock c. St. John's Metropolitan Area Board*, [1989] 2 R.C.S. 1181, il a rejeté le moyen de défense des compagnies ferroviaires fondé sur «l'autorisation du législateur» étant donné que, à son avis, le danger créé n'était pas une «conséquence inévitable» de l'exécution d'une quelconque obligation légale. Le juge de première instance a également statué que la Ville de Victoria était responsable d'avoir omis d'avertir convenablement le public du danger qui existait sur la rue Store. Il a rejeté la réclamation fondée sur la nuisance présentée contre la Ville parce que celle-ci n'avait aucun intérêt de propriété dans la voie ferrée. Enfin, il a conclu que l'appelant n'était pas coupable de négligence contributive, étant donné que sa décision de franchir la voie ferrée au moment et à l'endroit où il l'a fait lui avait été dictée par des circonstances indépen-

dantes de sa volonté et avait été prise «dans l'angoisse du moment». Ne pouvant déterminer le degré de faute de chacune des intimées, le juge de première instance les a tenues également responsables.

B. *British Columbia Court of Appeal* (1996), 82 B.C.A.C. 40 (Goldie J.A., Rowles and Finch JJ.A. concurring)

B. *Cour d'appel de la Colombie-Britannique* (1996), 82 B.C.A.C. 40 (le juge Goldie, avec l'appui des juges Rowles et Finch)

17 The Court of Appeal held that because the Railways had complied with all applicable regulations, they could not be found negligent with regard to the configuration of the Store Street tracks: see *Paskivski*, *supra*. It noted that the method used to build the flangeways on Store Street was standard for highway crossings in Canada. The Court of Appeal also emphasized that the width of the flangeways was within the allowable range defined in the "highway crossing" regulations, which he held to be applicable to the Store Street line. It rejected the trial judge's view that the location of the tracks on a city street was an "exceptional circumstance" which required the Railways to take steps beyond the standards required in those regulations. The trial judge's finding of negligence was set aside.

La Cour d'appel a statué que, comme les compagnies ferroviaires avaient observé toutes les dispositions réglementaires applicables, on ne pouvait conclure qu'elles avaient été négligentes dans l'établissement de la configuration de la voie ferrée de la rue Store: voir *Paskivski*, précité. La cour a souligné que la méthode appliquée pour construire les ornières de la voie ferrée de la rue Store était la norme suivie à l'égard des croisements de voies publiques au Canada. Elle a également indiqué que la largeur des ornières respectait la fourchette prescrite par les dispositions réglementaires régissant les «croisements de voies publiques» qui, a-t-elle conclu, s'appliquaient à la voie ferrée de la rue Store. Elle a rejeté l'opinion du juge de première instance que l'aménagement d'une voie ferrée dans une rue urbaine était une «circonstance exceptionnelle» obligeant les compagnies ferroviaires à prendre des mesures excédant les normes réglementaires requises. La conclusion de négligence tirée par le juge de première instance a été annulée.

18 The Court of Appeal also reversed the trial judge's holding with respect to nuisance, on the basis that the Railways were protected by the defence of statutory authority. In the Court of Appeal's view, the danger posed by the flangeways was an "inseparable consequence" of the Board orders which required the tracks to be laid at street grade with pavement between the rails. However, the Court of Appeal did find that both the Railways and the City were at fault for failing to warn the public of the hazard created by the flangeways. Finally, the Court of Appeal reversed the trial judge's conclusion that there was no contributory negligence. It found that the appellant had chosen to remain on the more dangerous of several possible courses and therefore could not

La Cour d'appel a également infirmé la conclusion du juge de première instance en ce qui concerne la nuisance, pour le motif que les compagnies ferroviaires pouvaient invoquer le moyen de défense fondé sur l'autorisation du législateur. De l'avis de la Cour d'appel, le danger que présentaient les ornières était une «conséquence inséparable» des ordonnances de la Commission qui exigeaient que la voie ferrée soit aménagée de niveau avec la rue et que du pavage soit placé entre les rails. Cependant, la Cour d'appel a statué que tant les compagnies ferroviaires que la Ville avaient commis une faute en omettant d'avertir le public du danger que présentaient les ornières. Enfin, la Cour d'appel a infirmé la conclusion d'absence de négligence contributive tirée par le juge de pre-

claim to have acted in the "agony of the moment" when he crossed the tracks. The Court of Appeal concluded that the appellant was liable for 50% of his damages.

mière instance. Elle a conclu que l'appelant avait choisi, parmi plusieurs parcours possibles, celui qui était le plus dangereux, et qu'il ne pouvait donc pas prétendre avoir agi «dans l'angoisse du moment» lorsqu'il a franchi la voie ferrée. La Cour d'appel a conclu que l'appelant était responsable de la moitié des dommages qu'il avait subis.

IV. Issues

The respondents have not challenged the finding that they were liable for failing to warn the appellant of the hazard created by the flangeways on Store Street. That conclusion is not at issue in this appeal. The three issues are:

1. Did the Court of Appeal err in finding that the Railways were not negligent with regard to the width of the flangeways on Store Street?

2. Did the Court of Appeal err in finding that the flangeways on Store Street did not give rise to liability for public nuisance?

3. Did the Court of Appeal err in reversing the trial judge's findings with respect to contributory negligence?

IV. Les questions en litige

19 Les intimées n'ont pas contesté la conclusion qu'elles étaient responsables d'avoir omis d'avertir l'appelant du danger créé par les ornières de la voie ferrée de la rue Store. Cette conclusion n'est pas en cause dans le présent pourvoi. Voici les trois questions en litige:

1. La Cour d'appel a-t-elle commis une erreur en concluant que les compagnies ferroviaires n'ont pas été négligentes en ce qui concerne la largeur des ornières de la voie ferrée de la rue Store?

2. La Cour d'appel a-t-elle commis une erreur en concluant que les ornières de la voie ferrée de la rue Store n'étaient pas une source de responsabilité fondée sur la nuisance publique?

3. La Cour d'appel a-t-elle commis une erreur en infirmant les conclusions du juge de première instance en ce qui concerne la négligence contributive?

V. Analysis

This appeal focuses on the relationship between statutory authority and civil liability. The appellant submits that the Railways are liable under theories of negligence and nuisance for installing dangerous flangeways on Store Street. The Railways deny liability on the basis that the Store Street line is a "highway crossing" and its flangeways comply in all respects with the safety regulations governing such crossings. The questions are: (1) whether the regulations relied upon by the Railways are in fact applicable to the Store Street line, and (2) if so, whether the Railways are nevertheless liable for failing to exercise their discretion under those regulations so as to minimize the hazard created by the flangeways.

V. L'analyse

20 Le présent pourvoi porte sur le lien entre le principe de l'autorisation du législateur et la responsabilité civile. L'appelant soutient que les compagnies ferroviaires sont responsables par l'effet des principes de la négligence et de la nuisance du fait qu'elles ont installé des ornières dangereuses dans la rue Store. Les compagnies ferroviaires nient leur responsabilité pour le motif que la ligne de la rue Store est un «croisement de voie publique» et que les ornières satisfont à tous égards aux dispositions réglementaires applicables en matière de sécurité. Il s'agit de répondre aux questions suivantes 1) Les dispositions réglementaires invoquées par les compagnies ferroviaires s'appliquent-elles effectivement à la ligne de la rue

Store? Dans l'affirmative, 2) les compagnies ferroviaires sont-elles néanmoins responsables parce qu'elles ont omis d'exercer le pouvoir discrétionnaire dont elles jouissaient en vertu de ces dispositions réglementaires pour réduire au minimum le danger créé par les ornières.

A. *Were the Railways Negligent with Regard to the Width of the Flangeways on Store Street?*

A. *Les compagnies ferroviaires ont-elles été négligentes en ce qui concerne la largeur des ornières de la voie ferrée de la rue Store?*

21 The first step in the negligence analysis is to determine whether the Railways owed a duty of care to the appellant with regard to the configuration of the Store Street tracks. If such a duty is found to exist, it must then be determined whether the Railways exercised the standard of care necessary to avoid breaching that duty. The relationship between the duty and the standard of care was explained by MacDonald J.A. of the Nova Scotia Court of Appeal in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241, at p. 254:

La première étape de l'analyse en matière de négligence consiste à se demander si les compagnies ferroviaires avaient une obligation de diligence envers l'appelant en ce qui concerne la configuration de la voie ferrée de la rue Store. Si l'on conclut à l'existence d'une telle obligation, il faut ensuite déterminer si elles ont agi avec le degré de diligence nécessaire pour ne pas manquer à cette obligation. Le lien qui existe entre l'obligation et le degré de diligence a été expliqué par le juge MacDonald de la Cour d'appel de la Nouvelle-Écosse dans l'arrêt *Nova Mink Ltd. c. Trans-Canada Airlines*, [1951] 2 D.L.R. 241, à la p. 254:

It is the function of the Judge to determine whether there is any duty of care imposed by the law upon the defendant and if so, to define the measure of its proper performance; it is for the [trier of fact] to determine, by reference to the criterion so declared, whether the defendant has failed in his legal duty.

[TRADUCTION] Il appartient au juge de déterminer si la loi impose au défendeur une obligation de diligence et, dans l'affirmative, de définir le critère permettant d'apprécier si cette obligation a été exécutée convenablement; il incombe au [juge des faits] de déterminer, à partir du critère ainsi défini, si le défendeur a manqué à son obligation légale.

. . .

. . .

The common law yields the conclusion that there is such a duty only where the circumstances of time, place, and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result. This element of reasonable prevision of expectable harm soon came to be associated with a fictional Reasonable Man whose apprehensions of harm became the touchstone of the existence of duty, in the same way as his conduct in the face of such apprehended harm became the standard of conformity to that duty. . . .

Il ressort de la common law qu'il n'y a une telle obligation que si, dans les mêmes circonstances de temps, de lieu et d'individus, une personne raisonnable se serait rendu compte que le risque qu'il y avait de causer un préjudice à d'autres personnes l'obligeait à faire preuve de diligence afin d'éviter ce résultat probable. Cet élément d'anticipation raisonnable d'un préjudice prévisible a rapidement été associé à une personne raisonnable fictive dont les appréhensions de préjudice sont devenues la pierre de touche de l'existence de l'obligation, de la même façon que sa conduite face à ce préjudice appréhendé est devenue la norme de conformité à cette obligation. . . .

Thus, a discussion of duty centres around its existence, while the standard of care clarifies what the

En conséquence, l'analyse de la question de l'obligation est axée sur l'existence de celle-ci, alors que

content of the duty is. Where there is no duty there is no negligence.

1. Duty of Care

The duty of care owed by a railway with respect to public crossings is determined, as it is for other private and public actors, under the two-step test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), at pp. 751-52, which was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, and numerous subsequent decisions. See, e.g., *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165. The two stages of the test were restated by Wilson J. as follows in *Kamloops*, at pp. 10-11:

(1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

The first step of the *Anns/Kamloops* test presents a relatively low threshold. In order to establish a *prima facie* duty of care, it must be shown that a relationship of "proximity" existed between the parties such that it was reasonably foreseeable that a careless act by the Railways could result in injury to the appellant.

The second step of the *Anns/Kamloops* test requires that it be determined whether any factors exist which should eliminate or limit the duty found under the first branch of the test. This approach recognizes that while the test of "proximity" may be met, liability does not necessarily follow. The existence of a duty of care must be considered in light of all relevant circumstances,

la norme de diligence en précise le contenu. En l'absence d'obligation, il ne peut y avoir de négligence.

1. L'obligation de diligence

22 L'obligation de diligence qui incombe à une compagnie ferroviaire à l'égard des passages à niveau publics est déterminée, comme elle l'est pour d'autres entités privées ou publiques, par l'application du critère en deux volets établi dans *Anns c. Merton London Borough Council*, [1978] A.C. 728 (H.L.), aux pp. 751 et 752, qui a été adopté par notre Cour dans *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2, ainsi que dans bon nombre d'arrêts ultérieurs. Voir, par exemple, *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228; *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165. Les deux volets du critère ont été reformulés de la façon suivante par le juge Wilson dans l'arrêt *Kamloops*, aux pp. 10 et 11:

1) y a-t-il des relations suffisamment étroites entre les parties ([la défenderesse] et la personne qui a subi les dommages) pour que [la défenderesse] ai[t] pu raisonnablement prévoir que [son] manque de diligence pourrait causer des dommages à la personne en cause? Dans l'affirmative,

2) existe-t-il des motifs de restreindre ou de rejeter a) la portée de l'obligation et b) la catégorie de personnes qui en bénéficient ou c) les dommages auxquels un manquement à l'obligation peut donner lieu?

23 Le premier volet du critère établi dans les arrêts *Anns* et *Kamloops* est relativement peu exigeant. Pour établir l'existence *prima facie* d'une obligation de diligence, il faut démontrer qu'il existait entre les parties un lien à ce point «étroit» qu'il était raisonnablement prévisible qu'un manque de diligence des compagnies ferroviaires pourrait donner lieu aux blessures de l'appelant.

24 Conformément au deuxième volet du critère établi dans les arrêts *Anns* et *Kamloops*, il faut déterminer s'il existe des facteurs qui élimine ou limite l'obligation dont l'existence a été établie en application du premier volet du critère. Cette approche reconnaît le fait que, même dans les cas où le critère du «lien étroit» est respecté, il n'y a pas nécessairement responsabilité. L'existence

including any applicable statutes or regulations. Thus, a legislative exemption from liability can negate a duty of care in circumstances where that duty would otherwise arise. The same holds true for immunities created by the courts. A policy decision is made in such cases to prevent the law of negligence from regulating certain relationships or relieving certain injuries, notwithstanding a finding of proximity between the parties. This may reflect the need to shield specific activities from judicial control, or the wish to prevent the "floodgates of litigation" from opening into areas of potentially unlimited liability. See, e.g., Allen M. Linden, *Canadian Tort Law* (6th ed. 1997), at p. 275.

d'une obligation de diligence doit être considérée en tenant compte de toutes les circonstances pertinentes, y compris les lois ou règlements applicables. En conséquence, une exonération législative de responsabilité peut écarter une obligation de diligence dans des circonstances qui, normalement, donneraient naissance à une telle obligation. Il en est de même pour les immunités créées par les tribunaux. Dans de tels cas, il est décidé, pour des considérations de politique générale, de ne pas appliquer le droit relatif à la diligence afin de régir certains rapports ou de réparer certains préjudices, et ce malgré que l'on ait conclu à l'existence d'un lien étroit entre les parties. Cette situation reflète peut-être la nécessité de soustraire certaines activités au contrôle judiciaire, ou encore la volonté d'empêcher une «avalanche de poursuites» dans des domaines où la responsabilité risque d'être illimitée. Voir, par exemple, Allen M. Linden, *Canadian Tort Law (*6e éd. 1997), à la p. 275.

25 In addition to negating a duty of care entirely, policy considerations may also serve to "limit" the "scope" of an existing duty under the second step of the *Anns/Kamloops* test. It is necessary to be clear about what this means. The purpose of the *Anns/Kamloops* test is to establish the existence of a legal duty, not to determine the standard of care required to establish liability. Policy considerations do not give rise to "greater" or "lesser" duties in different cases. A duty of care either exists or it does not. As discussed below, when the language of "duty" is framed in terms of its degree or content, what is really at issue is not the duty but the applicable standard of care. While the distinction is obvious, courts from time to time seem to lose sight of that principle. See, e.g., *Wade v. C.N.R.*, [1978] 1 S.C.R. 1064, at p. 1083.

En plus d'écarter complètement une obligation de diligence, des considérations de politique générale peuvent également avoir pour effet de «limiter» la «portée» d'une obligation par l'application du deuxième volet du critère établi dans les arrêts *Anns* et *Kamloops*. Il convient d'expliquer clairement ce que cela signifie. Le critère établi dans ces arrêts a pour objet de permettre de statuer sur l'existence d'une obligation légale et non de déterminer la norme de diligence requise pour établir la responsabilité. Les considérations de politique générale ne donnent pas naissance à des obligations «plus grandes» ou «moins grandes» d'une affaire à l'autre. Une obligation de diligence existe ou elle n'existe pas. Comme nous le verrons plus loin, lorsque l'«obligation» est définie en fonction de son degré ou de son contenu, la véritable question en litige n'est pas la nature de l'obligation, mais la norme de diligence applicable. Bien que la distinction soit évidente, les tribunaux semblent à l'occasion perdre ce principe de vue. Voir par exemple, *Wade c. C.N.*, [1978] 1 R.C.S. 1064, à la p. 1083.

26 The "scope" of a duty of care can be "limited" under the *Anns/Kamloops* test only in the sense that the duty will arise in certain situations and not

La «portée» de l'obligation de diligence peut être «limitée» par l'application du critère établi dans les arrêts *Anns* et *Kamloops*, mais seulement

in others. Such limitations may be based on broad policy considerations such as efficiency and economic fairness (see *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at pp. 1155-60) or on specific principles of law which operate in particular cases. See, e.g., *Hercules*, *supra*, at paras. 31-41, and *Just*, *supra*, at pp. 1235-36. The ultimate determination of whether a duty of care arises or not is an issue properly framed within the second step of the *Anns/Kamloops* test and its answer depends on the factual and legal context of each case. In that sense, the test is highly flexible.

However, the *Anns/Kamloops* test is not concerned with legislative or judicial policies which, as in this case, define the conduct required to meet an existing duty. Such policies relate to the standard of care. As a practical matter, the distinction between limiting the "scope" of a legal duty under the *Anns/Kamloops* test or limiting the requisite standard of care to discharge that duty is an elusive one. Both formulations go to reducing a defendant's exposure to liability, and in most cases the outcome will be the same under either approach. As a matter of analytical coherence, however, the distinction is important. See Lewis N. Klar, *Tort Law* (2nd ed. 1996), at p. 247, and *Just*, *supra*, at pp. 1243-44. Without it, the entire analysis of duty and standard would be collapsed together into the *Anns/Kamloops* framework, a purpose for which that test was not designed.

2. Standard of Care

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The

en ce sens que certaines situations lui donnent naissance et d'autres non. De telles limitations peuvent être fondées sur des considérations de politique générales telles l'efficacité et l'équité sur le plan financier (voir *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021, aux pp. 1155 à 1160) ou encore sur des principes de droit applicables dans des cas particuliers. Voir, par exemple, *Hercules*, précité, aux par. 31 à 41; *Just*, précité, aux pp. 1235 et 1236. En définitive, l'existence ou non d'une obligation de diligence est une question qu'il convient de trancher dans le cadre de l'application du deuxième volet du critère établi dans les arrêts *Anns* et *Kamloops*, et la réponse dépendra du contexte factuel et juridique de chaque affaire. En ce sens, il s'agit d'un critère très souple.

27 Cependant, ce critère ne s'attache pas à des règles législatives ou judiciaires qui, comme c'est le cas en l'espèce, définissent la conduite à suivre pour satisfaire à une obligation existante. De telles règles sont pertinentes à l'égard de la norme de diligence. En pratique, la distinction entre la limitation de la «portée» d'une obligation légale par l'application du critère établi dans les arrêts *Anns* et *Kamloops* et la limitation de la norme de diligence qu'il convient de respecter pour remplir cette obligation est élusive. Ces deux règles ont pour effet de réduire les risques qu'un défendeur voit sa responsabilité engagée, et, dans la plupart des cas, le résultat sera le même sous l'une ou l'autre approche. Cependant, la distinction est importante sur le plan de la cohérence analytique. Voir Lewis N. Klar, *Tort Law* (2e éd. 1996), à la p. 247, et *Just*, précité, aux pp. 1243 et 1244. Sans cette distinction, toute l'analyse de l'obligation et de la norme de diligence se fonderait en une seule étape dans le cadre du critère établi dans les arrêts *Anns* et *Kamloops*, fin pour laquelle ce critère n'a pas été conçu.

2. La norme de diligence

28 Une conduite est négligente si elle crée un risque de préjudice objectivement déraisonnable. Pour éviter que sa responsabilité ne soit engagée, une personne doit agir de façon aussi diligente que le ferait une personne ordinaire, raisonnable et pru-

measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

dente placée dans la même situation. Le caractère raisonnable d'une conduite dépend des faits de chaque espèce, y compris la probabilité qu'un préjudice connu ou prévisible survienne, la gravité de ce préjudice, et le fardeau ou le coût qu'il faudrait assumer pour le prévenir. En outre, on peut se fonder sur des indices externes de conduite raisonnable tels que l'usage, la pratique dans l'industrie concernée et les normes législatives ou réglementaires.

29 Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See Linden, *supra*, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

Les normes législatives sont pertinentes à l'égard de la norme de diligence en common law, mais leur portée ne coïncide pas nécessairement. Le fait qu'une loi prescrive ou interdise certaines activités peut contribuer à établir ce qui constitue une conduite raisonnable dans une situation donnée, mais cela n'éteint pas l'obligation sous-jacente d'agir de façon raisonnable. Voir *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205. Ainsi, le fait qu'une personne manque à une loi n'entraîne pas automatiquement sa responsabilité civile; ce fait n'est qu'un élément de preuve tendant à établir la négligence. Voir, par exemple, *Stewart c. Pettie*, [1995] 1 R.C.S. 131, au par. 36; *Saskatchewan Wheat Pool*, à la p. 225. De même, le seul fait que la loi ait été observée n'empêche pas en soi de conclure à la responsabilité civile. Voir Linden, *op. cit.*, à la p. 219. Cependant, les normes législatives peuvent être hautement pertinentes pour déterminer ce qui constitue une conduite raisonnable dans un cas particulier, et elles peuvent, en fait, rendre raisonnable un acte ou une omission qui, autrement, paraîtrait négligent. En conséquence, les tribunaux peuvent examiner le cadre législatif dans lequel les personnes et les sociétés doivent agir, tout en reconnaissant qu'il est impossible de se soustraire à l'obligation sous-jacente de diligence raisonnable simplement en s'acquittant de ses obligations légales.

30 The foregoing view, though generally accepted, has long been resisted in railway cases. For more than 90 years, railway companies have benefited from a "special rule" at common law which placed them in a privileged position within the law of negligence. As long as a railway complied with the

Bien que ce point de vue soit généralement accepté, on a pendant longtemps refusé de l'appliquer dans les affaires mettant en cause les entreprises ferroviaires. Depuis plus de 90 ans, les compagnies ferroviaires bénéficient d'une «règle spéciale» en common law qui les privilégie en

requirements imposed upon it by applicable statutes, regulations and administrative orders, it was under no further obligation — absent extraordinary circumstances — to act in an objectively reasonable manner. This rule has usually been framed in terms of limiting the "duty of care" owed by railways to the public. It is more easily understood as limiting the standard of care which railways must meet under an existing legal duty. Either way, the effect of the rule was the same: it excused railway companies in most cases from the ordinary obligation of prudence which governs other members of society.

matière de droit de la négligence. En effet, dans la mesure où elles se conforment aux obligations qui leur sont faites par les lois, règlements et ordonnances administratives applicables, les compagnies ferroviaires n'ont pas — en l'absence de circonstances extraordinaires — d'autre obligation que celle d'agir d'une manière objectivement raisonnable. On exprime généralement cette règle en disant qu'elle a pour effet de limiter l'«obligation de diligence» des compagnies ferroviaires envers le public. Elle est toutefois plus facile à saisir si on dit qu'elle réduit la norme de diligence à laquelle les compagnies ferroviaires doivent se conformer pour respecter une obligation légale existante. Sous l'une ou l'autre de ces approches, l'effet de la règle est le même: les compagnies ferroviaires sont, dans la plupart des cas, soustraites à l'obligation ordinaire de prudence qui incombe aux autres membres de la société.

31 The roots of the special rule reach back to the turn of the century, when railways occupied a position of unparalleled economic and social importance in the development of Canada. In *Grand Trunk Railway Co. v. McKay* (1903), 34 S.C.R. 81, this Court held that the safety measures prescribed by the *Railway Act* and the Board of Railway Commissioners were exhaustive, and railways could not be held liable for failing to take precautions beyond those requirements. The harshness of that doctrine was tempered somewhat by a separate line of cases, beginning with *Lake Erie & Detroit River Railway Co. v. Barclay* (1900), 30 S.C.R. 360, which held that in the event of exceptional danger or extraordinary conditions, a railway would be required to take greater safety measures than those officially prescribed. The *McKay* and *Barclay* doctrines have been combined in subsequent judgments to yield the current rule, which was restated by Dickson J. (as he then was) in *Paskivski*, *supra*, at pp. 698-99:

L'origine de la règle spéciale remonte au début du siècle, époque où les entreprises ferroviaires ont joué un rôle d'une importance économique et sociale sans précédent dans le développement du Canada. Dans l'arrêt *Grand Trunk Railway Co. c. McKay* (1903), 34 R.C.S. 81, notre Cour a conclu que les mesures de sécurité imposées par la *Loi sur les chemins de fer* et la Commission des chemins de fer étaient exhaustives, et que les compagnies de chemin de fer ne pouvaient être jugées responsables parce qu'elles avaient omis de prendre des précautions dépassant ces exigences. La rigidité de cette théorie a été quelque peu atténuée par un courant jurisprudentiel distinct, qui a débuté avec l'arrêt *Lake Erie & Detroit River Railway Co. c. Barclay* (1900), 30 R.C.S. 360, dans lequel notre Cour a conclu que, en cas de danger exceptionnel ou de conditions extraordinaires, les entreprises ferroviaires étaient tenues de prendre des mesures de sécurité plus importantes que celles officiellement prescrites. Les principes exposés dans les arrêts *McKay* et *Barclay* ont été combinés dans des jugements ultérieurs et ont produit la règle actuelle, qui a été reformulée par le juge Dickson (plus tard Juge en chef) dans *Paskivski*, précité, aux pp. 698 et 699:

A long line of cases . . . establishes that a railway company's duty of care to users of public crossings is

De nombreux précédents . . . ont établi que l'obligation d'une compagnie de chemin de fer d'user de pré-

limited to discharge of statutory obligations under the *Railway Act* . . . and compliance with orders of the Canadian Transport Commission — unless there are special or exceptional circumstances, in which event a common law duty of care will require additional precautions or safeguards.

cautions à l'égard des usagers des passages à niveau publics est restreinte à l'exécution des obligations statutaires prévues à la *Loi sur les chemins de fer* . . . et au respect des ordonnances rendues par la Commission canadienne des transports — sauf s'il existe des circonstances spéciales ou exceptionnelles. En ce cas une obligation de *common law* prescrit d'autres précautions ou mesures de sécurité.

32 This Court upheld the special rule in *Paskivski*, but it did so with reluctance. Dickson J. questioned the ongoing relevance of the rule at p. 708:

Dans *Paskivski* notre Cour a confirmé, mais non sans réticence, la règle spéciale. Le juge Dickson a mis en doute la pertinence de maintenir cette règle, à la p. 708:

The past seventy years have wrought many changes within Canada and today one might perhaps be inclined to question the relevance and validity of a rule of law which limits the common law duty of care of a railway to the special case or the exceptional case, particularly if those words are to receive a strict or narrow construction. It may well be that the interests of a young and undeveloped nation are best served by a minimum of impediment to industrial growth and economic expansion but in a more developed and populous nation this attitude of *laissez faire* may have to yield to accommodate the legitimate concern of society for other vital interests such as the safety and welfare of children.

Le Canada a beaucoup changé au cours des derniers soixante-dix ans et l'on pourrait être enclin aujourd'hui à mettre en doute la pertinence et la validité de la règle de droit qui restreint aux situations spéciales ou exceptionnelles l'obligation de prendre des précautions que le droit commun impose à une compagnie ferroviaire, surtout si ces mots doivent être interprétés rigoureusement ou restrictivement. Il se peut que les intérêts d'une jeune nation en voie de développement soient mieux servis en réduisant les obstacles à la croissance industrielle et à l'expansion économique, mais au sein d'une nation plus développée et populeuse, ce laisser-aller doit céder le pas à l'intérêt légitime qu'entretient la société à l'égard d'autres préoccupations fondamentales telles que la sécurité et le bien-être des enfants.

Laskin C.J., concurring in the result reached by Dickson J., was even more pointed in his criticism of the rule, at pp. 689-90:

Souscrivant au dispositif du juge Dickson, le juge en chef Laskin a critiqué la règle de façon encore plus tranchante, aux pp. 689 à 690:

. . . I am unable to appreciate why railway companies, in the conduct of their transportation operations, are today entitled to the benefit of a special rule, more favourable to them, by which their common law liability is to be gauged. When all allowances are made for the force and legal effect of the rules and regulations of the regulatory agency, the Canadian Transport Commission, to which railway companies are subject, and when the question of their liability turns on the common law of negligence, as is the case here, they cannot claim to be judged by any different standards than those that apply to other persons or entities charged with liability for negligence.

. . . je ne puis comprendre pourquoi les compagnies ferroviaires, dans la gestion de leurs opérations de transport, jouissent aujourd'hui d'une règle spéciale qui leur est plus favorable et selon laquelle nous devons déterminer leur responsabilité civile. Lorsque l'on tient compte de l'application et de la portée des règlements émanant de l'organisme de contrôle, la Commission canadienne des transports, à laquelle les compagnies de chemin de fer sont assujetties, et lorsque la question de la responsabilité de celles-ci entraîne l'application du droit commun relatif à la négligence, comme c'est le cas en l'espèce, ces compagnies ne peuvent prétendre être jugées selon des critères différents de ceux qui s'appliquent aux autres personnes ou aux autres entités dont la responsabilité est retenue pour cause de négligence.

33 The calls for reform expressed 24 years ago in *Paskivski* are more compelling today. The special status enjoyed by railway companies under the law

Les appels à la réforme lancés il y a 24 ans dans *Paskivski* sont encore plus impérieux aujourd'hui. Le traitement spécial dont jouissent les compa-

of negligence can no longer be justified in principle and the time has come for that rule to be set aside. Although a doctrine of such long standing should not lightly be discarded, there is little to be gained from maintaining for its own sake a line of jurisprudence which has lost its relevance.

gnies de chemin de fer en droit de la négligence ne peut plus se justifier au niveau des principes, et le temps est venu d'écarter cette règle. Bien qu'une doctrine appliquée depuis si longtemps ne puisse être mise de côté à la légère, il y a peu d'intérêt à maintenir, pour le principe, un courant jurisprudentiel qui a perdu sa pertinence.

The Railways contend that the *McKay/Barclay* rule should be preserved in deference to the expertise of the Board (now the Canadian Transportation Agency) on matters of railway safety. That argument is unpersuasive. The orders of an administrative board may be relevant to the determination of reasonable behaviour in specific circumstances. However, as noted, such orders do not oust the underlying standard of reasonableness imposed by common law. A railway, like any other company or individual, is subject to generally applicable principles of negligence, and should not enjoy special protection when its actions or omissions cause harm to other members of society. See *Harris v. Canadian Pacific Ltd.* (1989), 59 D.L.R. (4th) 151 (B.C.C.A.), at pp. 154-55.

34 Les compagnies ferroviaires soutiennent que la règle établie dans les arrêts *McKay* et *Barclay* doit être maintenue par déférence pour l'expertise de la Commission des Chemins de fer du Canada (maintenant l'Office des transports du Canada) en matière de sécurité ferroviaire. Cet argument n'est pas convaincant. Les ordonnances d'une commission administrative peuvent être pertinentes pour déterminer ce qui constitue une conduite raisonnable dans des circonstances particulières. Cependant, comme il a été souligné, de telles ordonnances n'ont pas pour effet d'écarter la norme sous-jacente du caractère raisonnable imposée par la common law. À l'instar de toute autre entreprise ou personne, les compagnies de chemin de fer sont assujetties aux principes généralement applicables en matière de négligence, et elles ne doivent pas jouir d'une protection spéciale lorsque leurs actes ou omissions causent un préjudice à d'autres membres de la société. Voir *Harris c. Canadian Pacific Ltd.* (1989), 59 D.L.R. (4th) 151 (C.A.C.-B.), aux pp. 154 et 155.

It is useful to note that even when applying the *McKay/Barclay* rule, courts have implicitly recognized that statutory compliance cannot replace the common law standard of care, and can be accepted as a substitute for that standard only in certain circumstances. Thus, in "ordinary" cases, compliance with the statute has been held to exhaust the requirement of reasonable conduct; in "exceptional" cases, however, the statutory standard has been deemed "insufficient" and the common law has been retrieved to fill the gap. As Robertson C.J. stated for the Ontario Court of Appeal in *Anderson v. Canadian National Railway Co.*, [1944] O.R. 169, at p. 177:

35 Il est utile de souligner que, même lorsqu'ils ont appliqué la règle établie dans les arrêts *McKay* et *Barclay*, les tribunaux ont implicitement reconnu que l'observation de la loi ne pouvait remplacer la norme de diligence prévue par la common law, et qu'elle ne pouvait être substituée à cette dernière que dans certaines circonstances. En conséquence, dans des affaires «ordinaires», il a été statué que l'observation de la loi satisfaisait à l'exigence de la conduite raisonnable; dans des cas «exceptionnels», cependant, la norme législative a été jugée «insuffisante» et on a fait appel à la common law pour combler cette lacune. Comme l'a dit le juge en chef Robertson au nom de la Cour d'appel de l'Ontario dans *Anderson c. Canadian National Railway Co.*, [1944] O.R. 169, à la p. 177:

. . . under ordinary circumstances, the railway is permitted to carry on its usual operations in the normal way, at a highway level crossing, without other precautions and warnings than are prescribed by the Railway Act or by the Board, but if the operations are carried on in such a way, or are of such a character, that the public using the crossing is exposed to exceptional danger . . . or if there are exceptional circumstances . . . that render ineffective or insufficient the precautions and warnings generally prescribed, then, in such cases, it may be left to a jury to say whether or not the railway has been negligent in failing to adopt other measures for the protection of those who may use the crossing.

[TRADUCTION] . . . dans des circonstances ordinaires, la compagnie de chemin de fer est autorisée à faire ses opérations habituelles de la façon normale, à un passage à niveau, sans prendre d'autres précautions ou donner d'autres avertissements que ceux qui sont prescrits par la Loi sur les chemins de fer ou par la Commission, mais si les opérations sont effectuées de telle façon ou sont de nature telle que le public utilisant le passage est exposé à un danger exceptionnel [. . .], ou encore s'il existe des circonstances exceptionnelles [. . .] qui rendent inefficaces ou insuffisantes les précautions et les avertissements généralement prescrits, en pareils cas, on peut laisser au jury le soin de dire si la compagnie de chemin de fer a été négligente en omettant de prendre des mesures additionnelles pour la protection de ceux qui peuvent utiliser le passage.

36 The problem with the *McKay/Barclay* rule was that instead of focusing the analysis on whether statutory compliance by the railway was reasonable in the circumstances, it assumed that step as a matter of law and forced the plaintiff to rebut the presumption. See, e.g., *Richardson v. Surrey (Dist.)* (1990), 43 B.C.L.R. (2d) 210 (B.C.C.A.), at p. 214. With the abolishment of the special rule, the correct principles can now be stated more clearly. Compliance with a statutory standard of care does not abrogate or supersede the obligation to comply with the common law standard of care. The requirements are concurrent, and each carries its own penalty for breach. However, in appropriate circumstances, compliance with statutory standards may entirely satisfy the common law standard of care and thus absolve a defendant of liability in negligence. See *Bux v. Slough Metals Ltd.*, [1974] 1 All E.R. 262 (C.A.).

Le problème que pose la règle établie dans les arrêts *McKay* et *Barclay* découlait du fait que, au lieu d'axer l'analyse sur la question de savoir si, dans les circonstances, l'entreprise ferroviaire avait agi raisonnablement en observant la loi, on le présumait en droit, contraignant ainsi le demandeur à réfuter cette présomption. Voir, par exemple, *Richardson c. Surrey (Dist.)* (1990), 43 B.C.L.R. 210 (C.A.C.-B.), à la p. 214. L'abolition de la règle spéciale permet d'énoncer plus clairement les principes qu'il convient d'appliquer. L'observation d'une norme de diligence d'origine législative n'a pas pour effet d'abroger ni ne remplacer l'obligation de respecter la norme de diligence prévue par la common law. Il s'agit d'obligations concomitantes, comportant chacune sa propre sanction en cas de manquement. Toutefois, il est possible que, dans des circonstances appropriées, l'observation de normes législatives satisfasse entièrement à la norme de diligence prévue par la common law et dégage donc le défendeur de toute responsabilité fondée sur la négligence. Voir *Bux c. Slough Metals Ltd.*, [1974] 1 All E.R. 262 (C.A.).

37 This approach is consistent with the holding in *Canadian National Railway Co. v. Vincent*, [1979] 1 S.C.R. 364. Although *Vincent* arose in the context of Quebec civil law, the reasoning of Pratte J. in that case is instructive, particularly since the common law standard of care is analogous to the requirement of reasonable prudence under the *Civil Code*. The facts in *Vincent* were straightforward. A child was struck by a train while riding her bicycle

Cette approche est compatible avec la décision rendue dans *Compagnie des Chemins de fer nationaux du Canada c. Vincent*, [1979] 1 R.C.S. 364. Même s'il s'agissait d'une affaire de droit civil du Québec, l'analyse du juge Pratte est instructive, en particulier parce que la norme de diligence prévue par la common law est analogue à l'obligation de prudence raisonnable du *Code civil*. Les faits de cette affaire étaient simples. Une enfant avait été

on a railway crossing in a densely populated area. It was undisputed that the railway had complied with all relevant safety measures prescribed by statute and regulations. The issue was whether the railways should have taken additional precautions in the circumstances of the case. Pratte J. stated at pp. 372-73:

> It must be said at the outset that, under the verdict, appellant is not held liable by reason of any breach of the *Railway Act* . . . or of the regulations of the Canadian Transport Commission. The issue is rather whether appellant can be found guilty of negligence under . . . [the *Civil Code*], although it complied with all the special statutory and regulatory provisions to which it is subject. The special provisions governing appellant certainly do not have the effect of exempting it from the ordinary law of civil liability. Savatier in *Traité de la responsabilité civile en droit français*, Vol. 1, No. 181, at p. 225, said the following on this point:
>
> > [TRANSLATION] 181. Fault despite compliance with regulations.
> >
> > When the regulatory authority intervenes to prescribe certain safeguards, it does so in the interest of third parties, not to their detriment. Except where otherwise provided, the precautions it is prescribing must therefore be viewed as being in no way exhaustive, and as not preventing those subject to the regulation from being also bound, apart from it, by any other obligations to exercise prudence.

Additional support for this view can be found in s. 367(4) of the *Railway Act* which provides:

> **367.** . . .
>
> (4) No inspection under or by the authority of this Act . . . and nothing in this Act . . . and nothing done, ordered, directed, required or provided for, or omitted to be done . . . under or by virtue of this Act . . . shall, except in so far as a compliance with the Act in question or with the order, direction, requirement or provision, constitutes a justification for what would otherwise be wrongful, relieve . . . any company of or from, or in any way diminish or affect, any liability or responsibility resting on it by law . . . for anything done or omitted to

frappée par un train en franchissant à bicyclette un passage à niveau situé dans un secteur à forte densité de population. Il n'était pas contesté que la compagnie de chemin de fer avait pris toutes les mesures de sécurité utiles prescrites par la loi et son règlement d'application. La question en litige était de savoir si la compagnie de chemin de fer en cause aurait dû prendre des précautions supplémentaires dans les circonstances de l'affaire. Le juge Pratte a dit ceci, aux pp. 372 et 373:

> Il faut dire dès maintenant que le verdict ne reproche à l'appelante aucune violation de la *Loi sur les chemins de fer* . . . ou des ordonnances de la Commission canadienne des transports. Il s'agit plutôt de savoir si l'appelante, même si elle a observé toutes les prescriptions statutaires ou réglementaires spéciales auxquelles elle est assujettie ne s'est pas néanmoins rendue coupable de négligence au sens [du *Code civil*]. Les dispositions particulières qui régissent l'appelante n'ont certes pas pour effet de la soustraire au régime de droit commun en matière de responsabilité civile. Savatier, *Traité de la responsabilité civile en droit français*, t. 1, nº 181, à la p. 225, s'exprime comme suit sur ce point:
>
> > 181. La faute en dépit de l'observation des règlements.
> >
> > Quand l'autorité réglementaire intervient pour prescrire certaines mesures de précaution, elle le fait dans l'intérêt des tiers, et non pas à leur préjudice. Sauf disposition contraire du texte, on doit donc considérer que les précautions qu'elle prescrit ne sont nullement limitatives, et n'empêchent pas les personnes soumises au règlement d'être également tenues, en dehors de lui, de toutes autres obligations de prudence.

Ce point de vue est également étayé par le par. 367(4) de la *Loi sur les chemins de fer*, qui est ainsi rédigé: 38

> **367.** . . .
>
> (4) Nulle inspection faite sous le régime ou sous l'autorité de la présente loi [. . .] et rien de ce qui a été fait, ordonné ou commandé, ou exigé ou prescrit, non plus que nulle omission de faire, d'ordonner ou de commander, d'exiger ou de prescrire [. . .] en vertu de [la présente loi], sauf en tant que l'observation de la loi ou de quelque ordonnance, ordre, prescription ou disposition constitue une justification de ce qui autrement serait répréhensible, ne soustrait [. . .] une compagnie à quelque obligation ou responsabilité que la loi lui

be done by that company, or for any wrongful act, negligence, default, misfeasance, malfeasance or nonfeasance of that company.

impose, ni de façon à amoindrir ou atteindre de quelque manière cette obligation ou responsabilité [. . .] par suite de quelque action ou omission de la part de cette compagnie, ou pour quelque tort, négligence ou défaut, abus d'autorité, acte illégal ou non-exécution de la part de cette compagnie.

Section 367(4) confirms that compliance with statutory standards does not normally exhaust a railway's obligations under principles of negligence. See *Vincent*, *supra*, at p. 373. A railway is presumptively bound by the common law, subject only to those situations where compliance with the statute or regulations provides "a justification for what would otherwise be wrongful". Like any exculpatory provision limiting common law rights, that passage should be narrowly construed. In the absence of a clear indication to the contrary, compliance with statutory standards should not be viewed as excusing a railway's obligation to take whatever precautions are reasonably required in the circumstances.

Le paragraphe 367(4) confirme que, normalement, l'observation de normes législatives ne soustrait pas une compagnie ferroviaire aux obligations qui lui incombent en vertu des principes de la négligence. Voir *Vincent*, précité, à la p. 373. Une entreprise ferroviaire est réputée liée par la common law, sauf dans les cas où l'observation de la loi ou des règlements fournit «une justification de ce qui autrement serait répréhensible». Comme toute autre disposition exonératoire limitant des droits reconnus par la common law, ce passage doit être interprété strictement. En l'absence d'indication claire à l'effet contraire, l'observation de normes législatives ne peut être considérée comme ayant pour effet d'écarter l'obligation qu'a une compagnie ferroviaire de prendre toutes les précautions qui s'imposent dans les circonstances.

39 The weight to be accorded to statutory compliance in the overall assessment of reasonableness depends on the nature of the statute and the circumstances of the case. It should be determined whether the legislative standards are necessarily applicable to the facts of the case. Statutory compliance will have more relevance in "ordinary" cases — i.e., cases clearly within the intended scope of the statute — than in cases involving special or unusual circumstances. See *Paskivski*, *supra*, and *Anderson*, *supra*. It should also be determined whether the legislative standards are specific or general, and whether they allow for discretion in the manner of performance. It is a well-established principle that an action will lie against any party, public or private, "for doing that which the legislature has authorized, if it be done negligently". See *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430 (H.L.), at pp. 455-56; see also *Kamloops*, *supra*, at p. 11, and *Just*, *supra*, at p. 1245. It follows that a party acting under statutory authority must still take such precautions as are reasonable within the range of that authority to minimize the risks which may

Le poids qu'il convient d'accorder à l'observation de la loi dans l'appréciation globale du caractère raisonnable des mesures prises dépend de la nature de la loi en cause et des circonstances de l'affaire. Il faut déterminer si les normes législatives s'appliquent nécessairement aux faits de l'affaire. L'observation de la loi sera un élément plus pertinent dans les affaires «ordinaires» — c.-à-d. les affaires qui relèvent clairement du champ d'application visé par la loi — que dans celles comportant des circonstances spéciales ou inhabituelles. Voir les arrêts *Paskivski* et *Anderson*, précités. Il faut également déterminer si les normes législatives sont de nature particulière ou générale, et si elles accordent un certain pouvoir discrétionnaire quant aux modalités d'exécution. Suivant un principe bien établi, des poursuites peuvent être intentées contre toute partie, publique ou privée, [TRADUCTION] «qui fait montre de négligence dans l'accomplissement d'un acte autorisé par le législateur». Voir *Geddis c. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430 (H.L.), aux pp. 455 et 456; voir également *Kamloops*, précité, à la p. 11, et *Just*, précité, à la p. 1245. Il s'ensuit que

result from its actions. See *Tock*, *supra* (applying similar principles in the nuisance context).

la partie qui agit en vertu d'une autorisation du législateur doit néanmoins prendre les précautions raisonnables dans les limites de cette autorisation afin de réduire au minimum les risques susceptibles de résulter de ses actes. Voir *Tock*, précité (pour l'application de principes analogues dans le contexte de la nuisance).

Where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required. By contrast, where a statute is general or permits discretion as to the manner of performance, or where unusual circumstances exist which are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care. This approach strikes an appropriate balance among several important policies, including deference to legislative determinations on matters of railway safety, security for railways which comply with prescribed standards, and protection for those who may be injured as a result of unreasonable choices made by railways in the exercise of official authority.

40 Lorsqu'une loi autorise certaines activités et définit strictement les modalités d'exécution qui doivent être suivies et les précautions qui doivent être prises, il est probable que l'on conclue que l'observation de cette loi vaut diligence raisonnable et qu'aucune autre mesure supplémentaire n'est requise. Par contraste, lorsqu'il s'agit d'une loi de nature générale ou qui accorde un certain pouvoir discrétionnaire quant aux modalités d'exécution, ou encore lorsqu'il existe des circonstances inhabituelles qui ne relèvent pas clairement du champ d'application de la loi, il est peu probable que la simple observation de celle-ci satisfasse à la norme de diligence applicable. Cette approche établit un juste équilibre entre plusieurs principes importants, notamment le respect des décisions du législateur en matière de sécurité ferroviaire, la protection des entreprises ferroviaires qui satisfont aux normes prescrites et la protection des personnes qui subissent un préjudice résultant de choix déraisonnables faits par ces entreprises dans l'exercice d'une autorisation officielle.

3. Application to the Case at Bar

3. L'application au présent cas

41 The first question is whether the Railways owed the appellant a duty of care. The Store Street tracks ran down the centre of an urban street, in direct proximity to the public. It was plainly foreseeable that carelessness by the Railways with respect to those tracks could cause injury to users of the street. Accordingly, a *prima facie* duty of care arose under the first step of the *Anns/Kamloops* test. See *Harris*, *supra*, at p. 155. Turning to the second step of the test, the Railways have not identified any legislative or judicial policies which would negate that duty or limit it. As noted, the authorities relied upon by the Railways concern the manner of carrying out a specific activity, and do not purport to limit civil liability. Those regulations do not affect the existence of a duty of care.

La première question en litige est de savoir si les compagnies ferroviaires avaient une obligation de diligence envers l'appelant. La voie ferrée de la rue Store occupait le centre d'une artère urbaine, à proximité immédiate du public. Il était clairement prévisible qu'un manque de diligence des compagnies ferroviaires à l'égard de cette voie ferrée pourrait causer un préjudice aux usagers de la rue. En conséquence, les compagnies ferroviaires avaient une obligation de diligence *prima facie* suivant le premier volet du critère établi dans les arrêts *Anns* et *Kamloops*. Voir *Harris*, précité, à la p. 155. En ce qui concerne le deuxième volet du critère, les compagnies ferroviaires n'ont pu indiquer aucun principe législatif ou jurisprudentiel écartant ou limitant cette obligation. Comme il a

été souligné précédemment, les textes invoqués par les compagnies ferroviaires traitent des modalités d'exécution d'une activité particulière et ne visent pas à limiter la responsabilité civile. Ces dispositions réglementaires n'ont aucune incidence sur l'existence même d'une obligation de diligence.

42 The standard of care required of the Railways was that of a prudent and reasonable person in the circumstances, having regard to all relevant factors including applicable statutes and regulations. It is undisputed that the Railways complied with certain safety standards prescribed in regulations and Board orders. The question is whether such compliance satisfied the requirement of objective reasonableness in this case and absolved the Railways of liability for the appellant's injury.

La norme de diligence à laquelle étaient tenues les compagnies ferroviaires était celle d'une personne prudente et raisonnable placée dans les mêmes circonstances, compte tenu de tous les facteurs pertinents, y compris les lois et règlements applicables. Il n'est pas contesté que les compagnies ferroviaires ont observé certaines normes de sécurité prescrites par les règlements et les ordonnances de la Commission. La question est de savoir si cette observation a permis de respecter l'obligation de conduite objectivement raisonnable en l'espèce, et si elle a dégagé les compagnies ferroviaires de toute responsabilité à l'égard des blessures subies par l'appelant.

43 At the outset, it should be noted that the location of the Store Street tracks does not, by itself, give rise to liability. The construction of a branch line on an urban street inevitably creates a risk to the public. When a party is specifically authorized to create that risk, compliance with such authority cannot be negligent. There is negligence only if, in the performance of the authorized activity, the party creates a risk that is objectively unreasonable in the circumstances. The construction of the Store Street tracks was authorized by the Board in 1908 on the basis of a detailed plan and profile, and the location of the tracks was reapproved in 1927. Pursuant to s. 223 of the *1906 Railway Act*, those orders could not have issued unless the Board was "satisfied that the branch line [was] necessary in the public interest or for the purpose of giving increased facilities to business". It cannot be said that it was unreasonable for the Railways to comply with those orders by constructing the tracks in the manner authorized.

Il convient d'abord de souligner que l'emplacement de la voie ferrée de la rue Store n'engage pas en soi la responsabilité des compagnies ferroviaires. La construction d'une ligne secondaire dans une artère urbaine crée inévitablement un risque pour le public. Lorsqu'une partie est expressément autorisée à créer un tel risque, le fait de se conformer à cette autorisation ne saurait constituer de la négligence. Il y a négligence seulement si, dans l'accomplissement de l'activité autorisée, la partie en cause crée un risque objectivement déraisonnable dans les circonstances. La construction de la voie ferrée de la rue Store a été autorisée par la Commission en 1908 sur la base d'un plan et d'un profil détaillés, et l'emplacement de la voie a été approuvé de nouveau en 1927. Aux termes de l'art. 223 de la *Loi sur les chemins de fer de 1906*, ces ordonnances n'auraient pas été prises si la Commission n'avait pas été «d'avis que l'embranchement [était] nécessaire dans l'intérêt public ou pour donner plus de facilités aux affaires». Il est impossible de prétendre qu'il était déraisonnable pour les compagnies ferroviaires de se conformer à ces ordonnances et de construire la voie ferrée de la manière autorisée.

The real issue is whether the Railways were negligent with respect to the dimensions of the flangeways on Store Street. In particular, it must be determined whether the Railways acted unreasonably by enlarging the flangeways to a width of nearly four inches in 1982, and by failing to install flange fillers at any time prior to the appellant's accident. This issue has to do with the minimization of risk, and is separate from the Railways' undisputed duty to warn the public of the inevitable hazard created by the tracks.

44 La véritable question litigieuse est de savoir si les compagnies ferroviaires ont été négligentes en ce qui concerne les dimensions des ornières de la voie ferrée de la rue Store. En particulier, il faut déterminer si les compagnies ferroviaires ont agi de façon déraisonnable lorsqu'elles ont porté la largeur des ornières à près de quatre pouces en 1982 et lorsqu'elles ont omis d'utiliser des entretoises d'ornières avant l'accident de l'appelant. Cette question porte sur la réduction au minimum du risque, et elle est distincte de l'obligation incontestable qu'ont les compagnies ferroviaires d'avertir le public du danger inévitable que crée la voie ferrée.

The Railways have cited two sets of authorities in support of their contention that they acted reasonably with respect to the flangeways. First, they submit that the method which they used to construct the flangeways in 1982 — flangerail on its side — is the standard design for flangeways at "highway crossings", as confirmed by Board Order No. 9729 dated February 29, 1910. Accordingly, they contend that they were under no obligation to employ a different method or to use different construction materials, such as flange fillers. Second, they submit that the width of the flangeways on Store Street was within the allowable range for a "railway-highway crossing at grade" as defined in s. 6 of General Order No. E-4. That provision states:

45 Les compagnies ferroviaires ont cité deux textes pour étayer leur prétention selon laquelle elles ont agi raisonnablement en ce qui concerne les ornières. Premièrement, elles soutiennent que la méthode qu'elles ont utilisée pour construire les ornières en 1982 — des rails à ornières reposant sur leur côté — est la méthode acceptée de construction des ornières aux «croisements de voies publiques», comme le confirme l'Ordonnance nº 9729 de la Commission datée du 29 février 1910. En conséquence, elles affirment qu'elles n'avaient aucune obligation d'utiliser une autre méthode ou des matériaux de construction différents, telles des entretoises d'ornières. Deuxièmement, elles prétendent que la largeur des ornières de la voie ferrée de la rue Store respectait la fourchette autorisée à l'égard des «passages à niveau au croisement d'un chemin de fer et d'une voie publique», définie à l'art. 6 de l'Ordonnance générale nº E-4. Cet article est ainsi rédigé:

6. A space not more than three inches deep and not less than two and one-half inches wide nor more than four and three-quarters inches wide shall be provided between the gauge side of the running rail and the planking and/or other road surface, as the case may be.

[TRADUCTION] 6. Un espace d'au plus trois pouces de profondeur sur une largeur d'au moins deux pouces et demi et d'au plus quatre pouces et trois-quarts sera ménagé entre la face intérieure du rail de roulement et le planchéiage et/ou autre revêtement, selon le cas.

A similar requirement appears in metric form in s. 7 of CTC 1980-8 Rail:

Une exigence similaire est formulée en unités métriques à l'art. 7 du CCT 1980-8 RAIL:

7. A flangeway with a width of between 65 mm and 120 mm to a depth of between 50 mm and 75 mm shall be provided between the gauge side of the running rail and the highway surface.

7. Une ornière de passage des boudins d'une largeur de 65 mm à 120 mm et d'une profondeur de 50 mm à 75 mm doit être ménagée entre la face intérieure du rail de roulement et la surface de la voie publique.

In the submission of the Railways, the foregoing authorities were applicable to the entire Store Street track, and defined the standard of care which was required. Because they complied with that standard, the Railways contend that their conduct was reasonable. The Court of Appeal agreed and reversed the trial judge's finding of negligence with respect to the flangeways.

Les compagnies ferroviaires ont fait valoir que ces textes s'appliquaient à toute la voie ferrée de la rue Store et définissaient la norme de diligence à respecter. Puisqu'elles se sont conformées à cette norme, les compagnies ferroviaires prétendent que leur conduite a été raisonnable. La Cour d'appel a accepté ces arguments et infirmé la conclusion du juge de première instance selon laquelle les compagnies ferroviaires avaient été négligentes en ce qui concerne les ornières.

46 In my view, the Railways' compliance with the cited authorities did not exhaust the requisite standard of care in this case, for two reasons. First, those authorities were not directly applicable to the circumstances, and second, they allowed for significant discretion in the manner of performance. These points will be addressed in turn.

À mon avis, le fait que les compagnies ferroviaires se soient conformées aux textes cités n'a pas satisfait à l'obligation de diligence applicable en l'espèce, et ce pour deux raisons. Premièrement, ces textes ne s'appliquaient pas directement aux circonstances de l'espèce et, deuxièmement, ils accordaient un pouvoir discrétionnaire appréciable à l'égard des modalités d'exécution. Ces deux points vont être examinés à tour de rôle.

(i) *Relevance to the Circumstances of this Case*

(i) *La pertinence eu égard aux circonstances du présent cas*

47 The authorities relied upon by the Railways apply to "highway crossings". A typical crossing involves the intersection of a railway and a highway at a single point, usually at a right angle. It does not follow that the standards prescribed for such crossings are also applicable to situations where, as here, a length of railway track is carried along an urban street for several blocks. The evidence in the record is inconclusive on the definition of a "crossing". The *Railway Act* provides, under the title "*Highway Crossings, etc.*", that a railway "may . . . be carried upon, along or across an existing highway. . .". See, e.g., *Railway Act*, R.S.C. 1970, c. R-2, s. 196(1). On the other hand, Board Order No. 38682 (January 18, 1927) stated that only the "crossing of Chatham Street" should comply with regulations governing "highway crossings", suggesting that the remainder of the Store Street line was not a crossing and was not subject to such regulations. General Order No. E-4 and CTC 1980-8 Rail provide that a "crossing" is "any railway crossing of a highway at grade or any highway crossing of a railway at grade". The diagrams accompanying those regulations show an ordinary crossing at a perpendicular angle.

Les textes invoqués par les compagnies ferroviaires s'appliquent aux «croisements de voies publiques». Le croisement type est formé par l'intersection, habituellement à angle droit, d'une voie ferrée et d'une voie publique en un point donné. Il ne s'ensuit pas que les normes prescrites pour la construction de tels croisements s'appliquent également aux cas où, comme en l'espèce, un bout de voie ferrée occupe le centre d'une artère urbaine sur une distance de plusieurs pâtés de maisons. La preuve versée au dossier n'est pas concluante en ce qui concerne la définition de «croisement». La *Loi sur les chemins de fer* indique, sous l'intertitre «Croisements de voies publiques», qu'un chemin de fer «peut [. . .] passer sur une voie publique existante et la longer ou la croiser . . .». Voir, par exemple, le par. 196(1) de la *Loi sur les chemins de fer*, S.R.C. 1970, ch. R-2. Par contre, dans l'Ordonnance nº 38682 de la Commission (18 janvier 1927) précisait que seul le [TRADUCTION] «croisement de la rue Chatham» devait être conforme au règlement régissant les «croisements de voies publiques», ce qui laissait entendre que le reste de la voie ferrée de la rue Store ne constituait pas un croisement et n'était pas assujetti à ce règlement.

Aux termes de l'Ordonnance générale nº E-4 et du CCT 1980-8 RAIL, le terme «croisement» s'entend de «tout croisement à niveau d'une voie publique et d'une voie ferrée». Les diagrammes accompagnant ces règlements représentent un croisement ordinaire à angle droit.

The Railways submitted that because the cited regulations are not expressly limited to "typical" crossings, they should presumptively apply to all situations in which a railway runs across or along a street at grade. That argument misses the point. It is the common law standard of care which is presumed to apply. If a regulatory standard is shown to govern a particular situation, it may be accepted as a reasonable substitute for the common law in that case. However, the regulation must be clearly applicable to a particular circumstance. To borrow the language of the "special rule" cases, the situation must be "ordinary" rather than "special or exceptional". See *Anderson*, *supra*, and *Paskivski*, *supra*.

48 Les compagnies ferroviaires ont soutenu que parce que le règlement cité ne se limite pas expressément aux croisements «typiques», il faut présumer qu'ils s'appliquent dans tous les cas où une voie ferrée traverse ou longe à niveau une rue. Cet argument ne répond pas à la question. C'est la norme de diligence prévue par la common law qui est réputée s'appliquer. S'il est établi qu'une norme réglementaire régit une situation particulière, elle peut être considérée comme une solution de rechange raisonnable à la common law dans un tel cas. Cependant, le règlement doit clairement s'appliquer à une circonstance particulière. Pour emprunter le langage des décisions qui ont appliqué la «règle spéciale», il doit s'agir d'une situation «ordinaire» plutôt que d'une situation «spéciale ou exceptionnelle». Voir les arrêts *Anderson* et *Paskivski*, précités.

Regardless of whether the Store Street line can be construed as a "crossing", it is obviously not a crossing in any ordinary or typical sense. The Railways' witness, Mr. Palasz, conceded during cross-examination that the Store Street tracks are unlike other highway crossings and are not specifically provided for under existing regulatory standards:

49 Que la voie ferrée de la rue Store puisse ou non être considérée comme un «croisement», il ne s'agit manifestement pas d'un croisement au sens ordinaire ou habituel de ce terme. Le témoin des compagnies ferroviaires, M. Palasz, a reconnu en contre-interrogatoire que la voie ferrée de la rue Store était différente d'autres croisements de voies publiques et qu'elle n'était pas visée expressément par les normes réglementaires présentement en vigueur:

Q. What standards are applied to tracks that run down urban streets as in Store Street?

A. I think Store Street is unique. It is the only track that I know that does run down an urban street. I know there are some others but it's the only one that I've been involved with.

Q. So does CP Rail have any standards that are applicable to tracks that run parallel and down urban streets?

[TRADUCTION]

Q. Quelles sont les normes appliquées aux voies ferrées qui parcourent des artères urbaines, comme c'est le cas sur la rue Store?

R. Je crois que le cas de la rue Store est unique. Il s'agit de la seule voie ferrée que je connaisse qui parcourt effectivement une artère urbaine. Je sais qu'il en existe quelques autres, mais c'est la seule que je connaisse.

Q. Le CP a-t-il des normes applicables aux voies ferrées qui longent et parcourent des artères urbaines?

A. None that I'm aware of.

. . .

Q. So, the best you can do, as I understand it then, is to try and adapt the standard practice circular that relates to crossings to the situation on Store Street? Is that my understanding of what you were trying to do?

A. We didn't really have any other specifications to adhere to, so we did take it as a crossing.

Q. So you tried to adapt the crossing standards to the situation on Store Street; do I understand you correctly?

A. Yes, we used it as a crossing at grade standard, yes.

As the trial judge noted, there are important practical differences between a railway line which cuts across traffic at a right angle and one which runs down the centre of a street. In particular, the danger posed by flangeways to riders of motorcycles and bicycles is far greater when those riders must travel alongside the gap for four blocks than when they cross over it once at a steep angle. A regulatory standard which is reasonable in the second situation may be wholly inappropriate in the first. Accordingly, the standards for flangeway widths defined in General Order No. E-4 and CTC 1980-8 Rail are not definitive of the standard of care in this case.

(ii) *Discretion Under the Regulations*

50 Even if the standards for "railway-highway crossing" regulations do apply to the Store Street tracks, the Railways' compliance with those standards did not necessarily constitute reasonable conduct in the circumstances. General Order No. E-4 and CTC 1980-8 Rail provide that a flangeway may be as narrow as 2.5 inches (65 millimetres) or as wide as 4.75 inches (126 millimetres). The decision to construct a flangeway at a particular width within that range was a matter left to the discretion

R. Pas que je sache.

. . .

Q. Ainsi, le mieux que vous pouvez faire, si je comprends bien, c'est d'essayer d'adapter la notice technique traitant des croisements au cas de la rue Store? Est-ce bien ce qu'on essayait de faire?

R. Comme nous ne disposions pas vraiment d'autre devis à respecter, nous l'avons traité comme s'il s'agissait d'un croisement.

Q. Vous avez donc essayé d'adapter les normes applicables aux croisements au cas de la rue Store, si je vous comprends bien?

R. Oui, nous les avons utilisées comme s'il s'agissait de normes applicables aux passages à niveau, c'est cela.

Comme l'a fait remarquer le juge de première instance, il existe des différences importantes sur le plan pratique entre une voie ferrée qui coupe la circulation à angle droit et une voie ferrée qui court au centre d'une rue. En particulier, le danger que présentent les ornières pour les motocyclistes et les cyclistes est beaucoup plus grand lorsque ceux-ci doivent longer l'espace qui sépare la voie ferrée de la chaussée sur une distance de quatre pâtés de maisons que lorsqu'ils ne la franchissent qu'une seule fois, à angle droit ou presque. Il est possible qu'une norme réglementaire raisonnable dans la deuxième situation ne convienne pas du tout dans la première. Par conséquent, les normes applicables à la largeur des ornières précisées par l'Ordonnance générale nº 4 et le CCT 1980-8 RAIL ne sauraient définir la norme de diligence applicable en l'espèce.

(ii) *Le pouvoir discrétionnaire prévu par les dispositions réglementaires*

Même si les normes applicables à l'égard des règlements régissant les «croisements d'une route et d'une voie ferrée» s'appliquent effectivement à la voie ferrée de la rue Store, l'observation de ces normes par les compagnies ferroviaires ne constituait pas nécessairement une conduite raisonnable dans les circonstances. L'Ordonnance générale nº 4 et le CCT 1980-8 RAIL précisent que la largeur d'une ornière peut varier de 2,5 pouces (65 millimètres) à 4,75 pouces (126 millimètres).

of the Railways. In exercising that discretion, they were bound by the common law and were required to take all reasonable steps to minimize foreseeable harm. It cannot be presumed that the entire range would be reasonably safe in all conditions. Indeed, the existence of a range instead of a uniform standard suggests that the appropriate width for a flangeway depends in part on the particular facts. The flangeways installed by the Railways in 1982 were between 3.75 and 3.94 inches wide. Had they been narrower by half an inch, the accident at issue in this case would not have occurred. The Railways' decision with respect to that half-inch raises an issue of reasonableness, not of regulatory compliance.

La décision de construire une ornière dont la largeur se situait entre ce minimum et ce maximum était laissée à la discrétion des compagnies ferroviaires. En exerçant ce pouvoir discrétionnaire, les compagnies ferroviaires étaient liées par les règles de la common law et devaient prendre toutes les mesures raisonnables afin de réduire au minimum le risque qu'un préjudice prévisible survienne. Il est impossible de présumer que toutes les largeurs comprises dans cette fourchette sont raisonnablement sécuritaires dans toutes les circonstances. De fait, l'existence même de cette fourchette au lieu d'une valeur uniforme tend à indiquer que la largeur appropriée pour une ornière dépend en partie des faits propres à chaque cas. La largeur des ornières installées par les compagnies ferroviaires en 1982 variait de 3,75 à 3,94 pouces. Si elle avait été inférieure d'un demi-pouce, l'accident en cause dans la présente affaire ne serait pas survenu. La décision des compagnies ferroviaires relativement à ce demi-pouce soulève la question du caractère raisonnable de leur conduite et non celle de l'observation de la réglementation.

(iii) *Application of the Common Law Standard of Care*

The trial judge correctly held that the Railways were subject to the common law standard of care. In applying that standard, he noted that the Railways have been aware of the risks associated with the flangeways on Store Street for some time. In particular, he found that the Railways knew or should have known of at least three other accidents between 1982 and 1986 which involved the flangeways and two-wheeled vehicles. On the basis of all the evidence adduced, he concluded as follows (at pp. 197-98):

> In the case at bar, the defendant Railways ought to have built the flangeways either at the minimum allowable width or with some form of flange filler. It was not enough to proceed on the basis that so long as their flangeways were durable and did not exceed the maximum regulatory standards . . . their neighbours must endure the consequent injuries arising from their "preferred" construction choice.

(iii) *L'application de la norme de diligence prévue par la common law*

51 Le juge de première instance a à bon droit statué que les compagnies ferroviaires étaient assujetties à la norme de diligence prévue par la common law. Il a souligné que, lorsqu'elles ont appliqué cette norme, les compagnies ferroviaires connaissaient depuis un certain temps déjà le risque que créaient les ornières de la rue Store. En particulier, il a conclu que les compagnies ferroviaires savaient ou auraient dû savoir qu'au moins trois autres accidents impliquant ces ornières et des véhicules à deux roues s'étaient produits entre 1982 et 1986. Sur le fondement de l'ensemble de la preuve présentée, il a conclu ainsi (aux pp. 197 et 198):

> [TRADUCTION] En l'espèce, les compagnies ferroviaires défenderesses auraient dû construire des ornières de la largeur minimale autorisée ou encore y insérer une sorte d'entretoise. Il n'était pas suffisant d'agir en partant du principe que, dans la mesure où les ornières étaient durables et n'excédaient pas les normes réglementaires [. . .] les personnes se trouvant à proximité doivent supporter les blessures découlant de la méthode

. . .

Because of the hazard created and the remedial measures available to the defendant Railways, I find the defendant Railways were obliged to take precautions over and above those mandated by statute and regulation. This they failed to do.

In the result, I find that the defendant Railways were negligent.

The trial judge's conclusion is consistent with the principles stated above. It was a proper exercise of his role as the finder of fact, and it should not have been disturbed by the Court of Appeal. Accordingly, the appeal is allowed with respect to the claim of negligence against the Railways.

B. *Did the Flangeways on Store Street Give Rise to Liability for Public Nuisance?*

52 The doctrine of public nuisance appears as a poorly understood area of the law. "A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience": see *Klar*, *supra*, at p. 525. Essentially, "[t]he conduct complained of must amount to . . . an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference": See G. H. L. Fridman, *The Law of Torts in Canada*, vol. I (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage. See, e.g., *Chessie v. J. D. Irving Ltd.* (1982), 22 C.C.L.T. 89 (N.B.C.A.). Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. See *ibid.*, at p. 94.

53 Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience

de construction «préférée» [des compagnies ferroviaires].

. . .

Vu le danger créé et les mesures correctrices que pouvaient prendre les compagnies ferroviaires défenderesses, j'estime que celles-ci avaient l'obligation de prendre des précautions supérieures à celles prescrites par la loi et le règlement. Elles ont omis de le faire.

En conséquence, j'estime que les compagnies ferroviaires défenderesses ont été négligentes.

La conclusion du juge de première instance est compatible avec les principes énoncés plus tôt. C'est à bon droit qu'il l'a tirée en sa qualité de juge des faits, et la Cour d'appel n'aurait pas dû l'infirmer. Par conséquent, le pourvoi est accueilli en ce qui concerne le moyen de négligence invoqué contre les compagnies ferroviaires.

B. *Les ornières de la voie ferrée de la rue Store étaient-elles une source de responsabilité pour cause de nuisance publique?*

La théorie de la nuisance publique semble être un domaine de droit qui est mal compris. [TRADUCTION] «L'expression nuisance publique a été définie comme étant toute activité qui porte atteinte de façon déraisonnable à l'intérêt du public relativement à des questions de santé, sécurité, moralité, confort ou commodité»; voir *Klar*, *op. cit.*, à la p. 525. Essentiellement, [TRADUCTION] «la conduite reprochée doit constituer une atteinte au droit qu'a le public en général de vivre sans inconvénient, inconfort ou autres formes d'atteinte»: voir G. H. L. Fridman, *The Law of Torts in Canada*, vol. I (1989), à la p. 168. Un particulier peut intenter une action privée pour nuisance publique en soutenant et établissant qu'il a subi des dommages particuliers. Voir, par exemple, *Chessie c. J. D. Irving Ltd.* (1982), 22 C.C.L.T. 89 (C.A.N.-B.). De telles actions comportent fréquemment des allégations d'atteinte déraisonnable à un droit de passage public, par exemple une rue ou une voie publique. Voir, *ibid.*, à la p. 94.

La question de savoir si une activité particulière constitue ou non une nuisance publique est une question de fait. De nombreux facteurs peuvent

caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood. See *Chessie*, *supra*, at p. 94. The trial judge found, at p. 206, that "the configuration and design of the railway tracks on Store Street constituted an unreasonable interference to the public of its right of access". He noted that Store Street was a mixed retail, industrial, and commercial area, and that the Railways should have foreseen the hazard posed by the flangeways to riders of two-wheeled vehicles. He found, at p. 207, that the cost of that hazard should be borne by the Railways as a matter of policy:

> In this case, the defendant Railways clearly installed that particular flange-rail system without regard to vehicular traffic. It was chosen because it cost less, and it was longer lasting and better suited to the needs of the rail traffic. However, the result of this choice of flange-rail, which created an almost 4-inch gap, was to effectively increase the risks to vehicle traffic. The cost of that increased risk to others must fall on the defendant Railways. It is a "cost of running the system."

The Court of Appeal did not dispute the trial judge's finding that there was an unreasonable interference, but held that the Railways had a defence of statutory authority because "the flangeways were an inseparable consequence of requiring the tracks to be laid at street grade flush with street level and the roadway paved between the rails" (p. 68). The issue is whether the Court of Appeal erred in that conclusion.

Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority. See *Lord Mayor, Aldermen and Citizens of the City of Manchester v.*

être considérés, notamment l'inconvénient causé par l'activité, la difficulté à diminuer ou éliminer le risque, l'utilité de l'activité, la pratique généralement suivie en la matière ailleurs, et la nature du voisinage. Voir *Chessie*, précité, à la p. 94. Le juge de première instance a conclu, à la p. 206, que [TRADUCTION] «la configuration et la conception de la voie ferrée de la rue Store constituaient une atteinte déraisonnable au droit d'accès du public». Il a souligné que la rue Store était un secteur mixte — activités industrielles et commerciales et vente au détail — et que les compagnies ferroviaires auraient dû prévoir le risque que présentaient les ornières pour les usagers de véhicules à deux roues. Il a conclu, à la p. 207, que les coûts afférents à ce risque devaient par principe être assumés par les entreprises ferroviaires:

> [TRADUCTION] En l'espèce, il est clair que les entreprises ferroviaires défenderesses ont installé ce système particulier de rails à ornières sans tenir compte de la circulation routière. Elles l'ont choisi parce qu'il était moins dispendieux, plus durable et mieux adapté au trafic ferroviaire. Cependant, le choix de ces rails à ornières créant un sillon de presque quatre pouces a eu pour effet d'accroître dans les faits les risques pour la circulation routière. Il incombe aux entreprises ferroviaires défenderesses d'assumer les coûts de cet accroissement des risques pour autrui. Ils font partie des «coûts d'exploitation du système».

La Cour d'appel n'a pas contesté la conclusion du juge de première instance qu'il y avait eu atteinte déraisonnable, mais elle a statué que les compagnies ferroviaires pouvaient invoquer le moyen de défense fondé sur l'autorisation du législateur parce que [TRADUCTION] «l'installation d'ornières était une conséquence inséparable de l'exigence que la voie ferrée soit aménagée de niveau avec la rue et que du pavage soit installé entre les rails» (p. 68). Il s'agit de déterminer si la Cour d'appel a fait erreur en tirant cette conclusion.

54 L'autorisation du législateur fournit, au mieux, un moyen de défense limité contre la nuisance. Suivant la règle traditionnelle, le défendeur ne sera pas jugé responsable si l'activité en cause est autorisée par une loi et s'il établit que la nuisance est [TRADUCTION] «le résultat ou la conséquence inévitable» de l'exercice de cette autorisation. Voir *Lord*

Farnworth, [1930] A.C. 171 (H.L.), at p. 183; *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150; *Schenck v. Ontario (Minister of Transportation and Communications)*, [1987] 2 S.C.R. 289. An unsuccessful attempt was made in *Tock*, *supra*, to depart from the traditional rule. Wilson J. writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance. La Forest J. (Dickson C.J. concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. Neither of those positions carried a majority.

Mayor, Aldermen and Citizens of the City of Manchester c. Farnworth, [1930] A.C. 171 (H.L.), à la p. 183; *City of Portage La Prairie c. B.C. Pea Growers Ltd.*, [1966] R.C.S. 150; *Schenck c. Ontario (Ministre des Transports et des Communications)*, [1987] 2 R.C.S. 289. On a essayé en vain, dans *Tock*, précité, de s'écarter de la règle traditionnelle. Le juge Wilson, s'exprimant en son propre nom et au nom de deux autres juges, a voulu limiter l'application de ce moyen de défense aux affaires mettant en jeu des obligations impératives ou des lois précisant les modalités d'exécution des obligations créées. Le juge La Forest (aux motifs duquel a souscrit le juge en chef Dickson) a adopté le point de vue plus radical selon lequel ce moyen de défense devrait être aboli complètement sauf si une loi énonce expressément une exonération de responsabilité. Ni l'un ni l'autre de ces points de vue n'a rallié une majorité de juges.

55 In the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*, at p. 1226:

> The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

En l'absence d'une règle nouvelle, il convient d'exposer de nouveau le point de vue traditionnel, qui demeure la façon la plus prévisible d'aborder la question et le plus simple à appliquer. Cette approche a été exposée par le juge Sopinka, dans *Tock*, à la p. 1226:

> Le défendeur doit établir qu'il n'existe aucun autre moyen d'exécuter l'ouvrage. Le simple fait qu'un moyen soit considérablement moins onéreux ne sera pas retenu. S'il n'existe qu'un seul moyen réalisable sur le plan pratique, il faut établir qu'il était pratiquement impossible d'éviter la nuisance. Il ne suffit pas que le défendeur établisse l'absence de négligence. La norme est plus sévère. Bien que le moyen de défense suscite certaines difficultés dans les faits, celles-ci seront résolues au détriment du défendeur compte tenu de l'attribution du fardeau de la preuve.

56 Turning to the facts of this case, the question raised by the traditional test is whether the hazard created on Store Street was an "inevitable result" of exercising statutory authority; that is, whether it was "practically impossible" for the Railways to avoid the nuisance which arose from the flangeways. As noted previously in the context of negligence, the regulations relied upon by the Railways prescribed a minimum width of 2.5 inches for flangeways. The Railways' decision to exceed that minimum by more than one inch was a matter

En ce qui concerne les faits de la présente affaire, la question soulevée par le critère traditionnel est de savoir si le risque créé dans la rue Store était le «résultat inévitable» de l'exercice de l'autorisation du législateur; en d'autres termes, il s'agit de déterminer s'il était «pratiquement impossible» pour les compagnies ferroviaires d'éviter la nuisance que constituaient les ornières. Comme il a été souligné plus tôt, dans l'examen de la question de la négligence, les dispositions réglementaires invoquées par les compagnies ferro-

of discretion and was not an "inevitable result" or "inseparable consequence" of complying with the regulations. The same may be said of the Railways' decision not to install flange fillers when such products became available after 1982. The flangeways created a considerably greater risk than was absolutely necessary. Accordingly, the Court of Appeal erred in permitting the Railways to assert the defence of statutory authority against the claim for nuisance.

viaires indiquaient que les ornières devaient mesurer au moins 2,5 pouces de largeur. La décision des compagnies ferroviaires d'aménager des ornières dont la largeur dépassait de plus d'un pouce cette largeur minimale relevait de l'exercice d'un pouvoir discrétionnaire et n'était pas un «résultat inévitable» ou une «conséquence indissociable» de l'observation des dispositions réglementaires applicables. On peut en dire autant de la décision des compagnies ferroviaires de ne pas utiliser d'entretoises d'ornières lorsque de tels produits sont devenus disponibles après 1982. Les ornières ont créé un risque considérablement plus grand que ce qui était absolument nécessaire. En conséquence, la Cour d'appel a commis une erreur en permettant aux compagnies ferroviaires d'invoquer la défense d'autorisation du législateur à l'encontre du moyen fondé sur la nuisance.

C. *Did the Court of Appeal Err in Reversing the Trial Judge's Findings with Respect to Contributory Negligence?*

C. *La Cour d'appel a-t-elle commis une erreur en infirmant les conclusions du juge de première instance en ce qui concerne la négligence contributive?*

In *Stein v. "Kathy K" (The Ship)*, [1976] 2 S.C.R. 802, at p. 808, it was held that while findings of fact with regard to the allocation of fault are not immutable, they should not be reversed by an appellate court "unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts". The record reveals no such errors by the trial judge, and the Court of Appeal ought not to have interfered with his findings on the issue of contributory negligence. Accordingly, the assessment of liability against the appellant for 50% of his damages is set aside.

57 Dans l'arrêt *Stein c. «Kathy K» (Le navire)*, [1976] 2 R.C.S. 802, à la p. 808, il a été jugé que, bien qu'elles ne soient pas intangibles, les conclusions de fait à l'égard de l'imputation de la faute ne doivent pas être modifiées par une cour d'appel «à moins qu'il ne soit établi que le juge du procès a commis une erreur manifeste et dominante qui a faussé son appréciation des faits». En l'espèce, le dossier ne révèle aucune erreur de cette nature de la part du juge de première instance, et la Cour d'appel n'aurait pas dû infirmer les conclusions de ce dernier sur la question de la négligence contributive. Par conséquent, la conclusion imputant à l'appelant la responsabilité de la moitié des dommages qu'il a subis est annulée.

VI. Conclusions and Disposition

VI. Conclusions et dispositif

The Railways were negligent with respect to the width of the flangeways on Store Street. The *McKay/Barclay* "special rule" is abolished, and the Railways are therefore subject to ordinary principles of negligence. They owed a duty of care to the appellant with respect to the flangeways on Store

58 Les compagnies ferroviaires ont été négligentes pour ce qui est de la largeur des ornières de la voie ferrée de la rue Store. La «règle spéciale» établie dans les arrêts *McKay* et *Barclay* est abolie, et les compagnies ferroviaires sont donc assujetties aux principes ordinaires de la négligence. Elles avaient

Street, and that duty required them to exercise reasonable care in the circumstances. Their compliance with regulatory standards did not replace or exhaust that obligation. Because the Store Street tracks are not a typical "highway crossing", the Railways were required to take precautions beyond mere compliance with the safety standards which govern such crossings. In particular, they should have taken steps to minimize the risk to two-wheeled vehicles by building the flangeways at the minimum allowable width or by installing flange fillers. The trial judge's finding of negligence was a proper exercise of his discretion as the finder of fact and should not have been reversed by the Court of Appeal.

une obligation de diligence envers l'appelant relativement aux ornières de la voie ferrée de la rue Store, et cette obligation commandaient qu'elles fassent montre de diligence raisonnable dans les circonstances. L'observation des normes réglementaires n'a pas eu pour effet de remplacer cette obligation ou d'y satisfaire. Comme la voie ferrée de la rue Store n'était pas un «croisement de voie publique» typique, les compagnies ferroviaires ne devaient pas se contenter d'observer les normes de sécurité applicables à de tels croisements mais elles avaient plutôt l'obligation de prendre des précautions supplémentaires. En particulier, elles auraient dû prendre des mesures pour réduire au minimum le risque que les ornières présentaient pour les véhicules à deux roues, soit en construisant des ornières de la largeur minimale autorisée soit en plaçant des entretoises dans celles-ci. Le juge de première instance a bien exercé son pouvoir discrétionnaire en tant que juge des faits en concluant à la négligence, et la Cour d'appel n'aurait pas dû infirmer cette conclusion.

59 The Store Street tracks created an unreasonable interference with the public's use and enjoyment of Store Street and therefore constituted a public nuisance. The Court of Appeal erred in finding that the Railways were entitled to the defence of statutory authority. The appropriate test is the traditional rule restated by Sopinka J. in *Tock*, *supra*. It was not "practically impossible" for the Railways to avoid the nuisance which arose from the flangeways on Store Street. Because the Railways had discretion with regard to the width of the flangeways, their failure to minimize the hazard was not an "inevitable consequence" of exercising regulatory authority.

La voie ferrée de la rue Store créait une atteinte déraisonnable à l'utilisation et la jouissance de la rue Store par le public et constituait, en conséquence, une nuisance publique. La Cour d'appel a commis une erreur en concluant que les compagnies ferroviaires avaient le droit d'invoquer le moyen de défense fondé sur l'autorisation du législateur. Le critère qu'il convient d'appliquer est la règle traditionnelle reformulée par le juge Sopinka dans l'arrêt *Tock*, précité. Il n'était pas «pratiquement impossible» pour les compagnies ferroviaires d'éviter la nuisance que constituaient les ornières de la voie ferrée de la rue Store. Étant donné qu'elles avaient un certain pouvoir discrétionnaire à l'égard de la largeur des ornières, l'omission des compagnies ferroviaires de réduire les risques au minimum n'était pas une «conséquence inévitable» de l'exercice de l'autorisation du législateur.

60 The Court of Appeal erred in reversing the findings of the trial judge with regard to contributory negligence. Those findings were not shown to constitute palpable and overriding error.

La Cour d'appel a fait erreur en infirmant les conclusions du juge de première instance relativement à la négligence contributive. Il n'a pas été établi que ces conclusions constituaient une erreur manifeste et dominante.

Accordingly, the appeal is allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Gordon & Velletta, Victoria.

Solicitors for the respondent The Corporation of the City of Victoria: Sugden, McFee & Roos, Vancouver.

Solicitors for the respondents The Esquimalt and Nanaimo Railway Company and Canadian Pacific Limited/Canadien Pacifique Limitée: Lawson, Lundell, Lawson & McIntosh, Vancouver.

61 En conséquence, le pourvoi est accueilli, avec dépens dans toutes les cours.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant: Gordon & Velletta, Victoria.

Procureurs de l'intimée la Ville de Victoria: Sugden, McFee & Roos, Vancouver.

Procureurs des intimées la Compagnie du chemin de fer d'Esquimalt à Nanaïmo et Canadian Pacific Limited/Canadien Pacifique Limitée: Lawson, Lundell, Lawson & McIntosh, Vancouver.

TAB 16

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission),* 2010 BCCA 396

Date: 20100909
Dockets: CA037741, CA037747

Docket: CA037741

Between:

Cambie Surgeries Corporation

Appellant
(Plaintiff)

And

Medical Services Commission of British Columbia, Minister of Health Services of British Columbia and Attorney General of British Columbia

Respondents
(Defendants)

And

Specialist Referral Clinic (Vancouver) Inc.

Respondents
(Defendant by Counterclaim)

- and -

Docket: CA037747

Between:

Cambie Surgeries Corporation

Respondent
(Plaintiff)

And

Medical Services Commission of British Columbia, Minister of Health Services of British Columbia and Attorney General of British Columbia

Respondents
(Defendants)

And

Specialist Referral Clinic (Vancouver) Inc.

Appellant
(Defendant by Counterclaim)

Before: The Honourable Madam Justice Saunders

The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, November 20, 2009
(*Schooff v. Medical Services Commission*, 2009 BCSC 1596,
Vancouver Registry Nos. S088484 and S090663)

Counsel for the Appellants:	Irwin G. Nathanson, Q.C. Marvin R.V. Storrow, Q.C
Counsel for the Respondents (Defendants):	George H. Copley, Q.C. Jonathan G. Penner
Place and Date of Hearing:	Vancouver, British Columbia June 24, 2010
Place and Date of Judgment:	Vancouver, British Columbia September 9, 2010

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This is an appeal, with leave, from the granting of an injunction requiring the appellant medical clinics to allow inspectors from the Medical Services Commission (the "Commission") access to their premises and records in order to perform audits under s. 36 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286.

[2] The clinics contend that certain provisions of the *Act* are unconstitutional. As the proposed audits may be aimed at documenting violations of those provisions, the clinics say that the chambers judge was required to consider the constitutionality of the impugned provisions before granting an injunction. The Commission, on the other hand, argues that its right to audit the clinics is not dependent on the impugned provisions, and that the injunction was, therefore, validly granted.

[3] In my view, for reasons that follow, the manner in which the application for an injunction came before the Supreme Court was irregular, and the chambers judge ought not, in the circumstances, to have granted the injunction. The *Medicare Protection Act* makes adequate provision for orders facilitating audits where such orders are needed. The extraordinary powers of the Supreme Court to grant an injunction need not have been engaged in this case. Further, the procedure that was followed in this case obscured the legal issues surrounding the making of the order, and created unnecessary difficulties.

The Legislation and the Underlying Action

[4] The *Medicare Protection Act* governs the administration of British Columbia's Medical Services Plan (the "Plan"), the primary public health insurance scheme in the province. Most residents of B.C. are enrolled as beneficiaries and most physicians are enrolled as practitioners entitled to payment for their services under the Plan. A number of the provisions of the *Act* are relevant to the appeal. Rather than setting them out in the body of these reasons, I have appended the relevant portions of the statute.

[5] In the normal course, practitioners bill the Commission for services performed for beneficiaries, and the Commission pays the practitioners in accordance with its established payment schedules. Section 14 of the *Act* allows enrolled practitioners to opt out of the normal payment arrangements and to bill patients directly.

[6] Unless a physician has opted out or is not enrolled in the Plan, s. 17 prohibits him or her from charging a beneficiary for the provision of a service covered by the Plan. Where a physician has opted out or is not enrolled, s. 18 prohibits him or her from charging a patient more than the amount that the Plan would pay for a medical service.

[7] Together, ss. 17 and 18 greatly restrict the scope for medical practitioners to bill patients directly for their services. Section 18 also prohibits "extra billing" – i.e., billing a patient for an amount beyond that which the Plan pays for a service.

[8] The clinics admit that they have engaged in practices that would violate the statutory prohibitions against direct and extra billing if those prohibitions are constitutional. Some patients have signed "acknowledgement forms" confirming their understanding that they are being billed for amounts in excess of those provided for under the Plan.

[9] The clinics contend, however, that ss. 14, 17 and 18 of the *Act* are unconstitutional. They allege that those provisions have the effect of preventing patients from using their own resources to obtain desired medical care in a timely manner. Relying primarily on *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, the clinics argue that the impugned provisions of the *Medicare Protection Act* violate the rights of patients to life, liberty, and security of the person in a manner that is not in accordance with principles of fundamental justice, contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. They have commenced an action seeking a declaration that the impugned provisions are unconstitutional.

[10] The Minister of Health Services has filed a counterclaim, seeking a declaration that the acknowledgement forms signed by patients are of no effect. He also seeks damages from the clinics for economic losses that the Province claims to have suffered as a result of the clinics' extra billing practices and of actions taken by the Federal Government under the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.

[11] The Medical Services Commission has also filed a counterclaim, seeking interim and permanent injunctions under s. 45.1 of the *Medicare Protection Act* prohibiting the clinics from violating ss. 17 and 18 of the *Act*. In addition, the Commission's counterclaim seeks a warrant under s. 36 of the *Act* authorizing its inspectors to enter the clinics and inspect medical records in their premises. It also seeks an injunction in similar terms. Finally, the counterclaim seeks an injunction restraining the clinics from "hindering, molesting or interfering with its inspectors".

[12] The current appeal arises out of an interlocutory application by the Medical Services Commission seeking a warrant under s. 36, or, alternatively, injunctive relief allowing its inspectors to enter the premises of the clinics and inspect their records for the purpose of conducting an audit. The Commission also sought ancillary injunctive relief requiring the clinics to allow the inspectors access to their premises and records, and prohibiting them from interfering with the audit process.

The Reasons of the Chambers Judge

[13] The chambers judge began by considering whether she had jurisdiction to issue a warrant authorizing the Commission's inspectors to enter the clinics under s. 36(7) of the *Act*. Such a warrant may be issued by a "justice", a term which by virtue of s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, means a justice of the peace.

[14] The judge found that she had authority to issue a warrant because under s. 30(3) of the *Provincial Court Act*, judges of the Supreme Court are justices of the peace. She declined to act under s. 36, however, finding that it was preferable to proceed under the inherent jurisdiction of the Supreme Court. She did so for two reasons – first, she considered that her ability to consider equitable considerations was clearer when exercising inherent jurisdiction. She also thought it preferable that her decision not be subject to judicial review by another member of the Supreme Court, as it would be if she made it in her role as a justice of the peace.

[15] The judge considered that the application presented an appropriate basis for the exercise of the court's jurisdiction to grant injunctions. She noted that the injunction was sought for the purpose of enforcing a public right, with the support of the Attorney General, and also noted that the statute itself did not provide for any penal sanction for refusing to cooperate in an audit, apart from a penalty for obstructing an inspector.

[16] The judge then set out to determine the appropriate test for the granting of the injunction:

> [107] A threshold issue is whether the order sought is interlocutory or final. The underlying premise of an interlocutory injunction is that the Plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trial (see Robert J. Sharpe, *Injunctions and Specific Performance*, loose leaf (Aurora: Canada Law Book, 1992) at ¶2.550). That is not the underlying premise of this application. Instead, the Commission seeks to enforce its previous decision to audit. The Commission could have brought the application whether or not the Action existed, and I do not believe that the fact the Commission has brought the application as part of its counterclaim necessarily makes it an interlocutory application.
>
> [108] It is true that the Commission in its counterclaim seeks declarations that Cambie and SRC have contravened and will contravene ss. 17 and 18 of the *MPA*, and interim and permanent injunctions restraining such contraventions. However, this application is not for interlocutory

> restraining orders with respect to alleged contraventions of ss. 17 and 18 of the *MPA*. Instead, it is to compel Cambie and SRC to permit the audit to be done under s. 36 of the *MPA*.
>
> [109] As Mr. Nathanson for Cambie observed, once the audit is done, it is done. The Commission is not seeking an order that records be preserved until the audit is completed or some other interim form of relief. Counsel for the Commission, Mr. Copley, conceded that the application is in some respects for a final order.
>
> [110] I conclude that the Commission is seeking a final order with respect to the audit and I will assess the application on that basis.

[17] Having concluded that what was being sought was a final order, the judge referred to *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. She accepted that the normal test for the granting of an interlocutory injunction requires a three-stage analysis: first, the applicant must demonstrate that there is a serious question to be tried; second, the applicant must show that it may suffer irreparable harm if the relief is not granted; finally, the court must determine whether the balance of convenience favours the applicant or the respondent.

[18] The judge then said:

> [114] If the injunction sought is a final order, as in this case, the first stage of the test is altered, in that the Court should go beyond a preliminary investigation and perform instead a more extensive review of the merits, with the anticipated results on the merits also being kept in mind at the second and third stages of the test. [Citation omitted.]
>
> [115] Thus, in these circumstances, it is not sufficient for the Commission to show a triable issue regarding its assertion that it is entitled to an audit, but instead it must establish on the balance of probabilities that the Commission is entitled under the legislation to perform the audit and that the audit has been refused.

[19] The judge proceeded to consider whether the *Medicare Protection Act* authorized an audit and whether the clinics had refused to allow one to proceed. Having found "on the balance of probabilities" that the statutory preconditions for an audit were satisfied, and that the clinics had refused to allow one, she concluded that the applicant had passed the first stage of the injunction test. She then proceeded to consider the questions of irreparable harm and balance of convenience, and concluded that an injunction ought to issue:

> [138] ... The public interest supports the enforcement of duly enacted legislation such as the *MPA*. There was no evidence that the audit will interfere with the ability of the Plaintiffs to pursue their constitutional challenge, especially if appropriate conditions are imposed. I am satisfied that the audit may cause the Clinics some inconvenience and possibly some expense (in the form of staff time), and that the private interests of the Clinics may thereby be affected. However there is nothing to suggest a countervailing public interest that would outweigh the public interest relied upon by the Commission. While the Clinics' challenge to the constitutionality of the legislation is a serious one, so is the defence to it as described by the Commission in its submissions. No conclusion can be reached as to the likely outcome of the challenge to the legislation, and I am satisfied that the balance of inconvenience favours granting the order sought, although not with immediate effect ....
>
> [148] I have concluded that the fair and just order in this case is that the injunction will be stayed for some months. During that time, counsel will attempt to reach agreement on the terms on which the audit will be conducted, and on the related issue of the scope of discovery (because to allow both full discovery and an audit could be unnecessary and possibly oppressive).
>
> [149] Absent further order, or agreement, the injunction ... will be effective on March 1, 2010.

[20] The Commission subsequently agreed not to take any steps to carry out the audit or to enforce the injunction pending the determination of these appeals.

Positions of the Parties on the Appeal

[21] The appellants contend that the judge correctly set out the test for the granting of the injunction, but say that she erred in not considering the constitutionality of the impugned legislation at the first stage of the *RJR-MacDonald* test. They say that because the audits are sought for the purpose of determining the extent of violations of ss. 17 and 18 of the *Medicare Protection Act*, the judge was required, at the first stage of the test, to reach a conclusion as to whether, on the balance of probabilities, those statutory provisions are constitutional. As the judge found that "[n]o conclusion can be reached as to the likely outcome of the challenge to the legislation", she ought not to have granted the injunction.

[22] The Commission also agrees that the judge correctly set out the test for the granting of the injunction. It says, however, that the judge was not required to reach any conclusion on the constitutionality of the impugned sections because the Commission's right to perform an audit does not depend on there being any violation (or even suspicion of a violation) of ss. 17 and 18 of the *Act*. In its submission, those sections are simply irrelevant to the issue of whether the Commission has the right to an audit.

The Test for an Injunction

[23] Unfortunately, despite the agreement of the parties that the trial judge correctly set out the test for the granting of an injunction in this case, it is my view that the test enunciated was incorrect.

[24] *RJR-MacDonald* sets out the test for the granting of an interlocutory injunction. The normal test for such an injunction is the familiar three-part test discussed by the chambers judge. The test is designed to address situations in which a court does not have the ability to finally determine the merits of the case, but must nevertheless decide whether an interim order should be made to protect the applicant's interests.

[25] *RJR-MacDonald* describes an exceptional category of cases where the court must undertake a more probing analysis of the strength of the applicant's case at the first stage of the analysis at 338-39:

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:
>
>> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff

> would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.
>
> Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.
>
> ...
>
> The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

[26] It is important to appreciate that the Court was not, in describing this special category of cases, purporting to redefine the tests for the granting of a final, as opposed to interlocutory, injunction. Rather, it was describing a test that is applicable to a narrow class of interlocutory injunctions, where the granting or withholding of the injunction will have the practical effect of bringing the litigation to an end. In this category of cases, circumstances require that courts do their best to do justice between the parties, recognizing that a full hearing to finally determine the merits of the action will never take place.

[27] Neither the usual nor the modified test discussed in *RJR-MacDonald* has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.

[28] In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

[29] In the case before us, the chambers trial judge concluded that the application should be treated as one for a final order, because the claim for an injunction could have been brought as an independent action. Having made that determination, however, the judge proceeded to apply the test for the granting of an interlocutory injunction. She fell into error in that regard.

[30] I agree with the chambers judge's conclusion that the application by the Commission for a warrant or injunction to facilitate an audit was an application for final relief. The application was not genuinely interlocutory – it was not an application for interim relief pending final determination of the litigation. Rather, it was an application for summary determination of one aspect of the Commission's counterclaim.

[31] That aspect of the counterclaim was not closely connected with the balance of the litigation. As the Commission pointed out in argument, its statutory right to conduct an audit does not depend on it having suspicion that the impugned provisions of the statute are being violated, nor does it depend on it succeeding on the rest of the claim or counterclaim. It was, therefore, possible for the court to consider the Commission's application for injunctive relief on a summary basis, separately from the balance of the claim and counterclaims.

[32] In considering the Commission's application, however, the chambers judge was required to determine whether a final order should be granted, and should not have applied the interlocutory injunction test.

Should an Injunction Have Been Granted?

[33] On the face of it, the Commission established that it was legally entitled to conduct an audit under s. 36 of the *Act*. The first part of the test for the granting of a final injunction was, therefore, made out. Nonetheless, it is my view that, for reasons that follow, the court ought not to have granted injunctive relief in this case.

[34] While courts have jurisdiction to grant injunctions to enforce statutory obligations, the jurisdiction must be exercised carefully. Where, as here, there is a clear method of enforcement set out in the statute, the court should not grant injunctive relief unless the statutory provision is shown to be inadequate in some respect.

[35] There are a number of respects in which a statutory regime may be inadequate. For example, the penalty for breach of the statute may be so limited that a party chooses to treat it as a cost of doing business, and therefore flout the law (see Robert J. Sharpe, *Injunctions and Specific Performance* (Looseleaf Edition, Toronto: Canada Law Book, 1998-2009) §3.210; *A.G. v. Harris*, [1961] 1 Q.B. 74 (C.A.); *Alberta (Attorney General) v. Plantation Indoor Plants Ltd.* (1982), 133 D.L.R. (3d) 741 (Alta. C.A.), rev'd on other grounds [1985] 1 S.C.R. 366; *Attorney-General for Ontario v. Grabarchuk* (1976), 67 D.L.R. (3d) 31 (Ont. Div. Ct.).

[36] A statutory provision may also prove inadequate where a party who suffers harm is unable to invoke the provision (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048), or where serious danger or harm would result from the delay inherent in invoking a statutory remedy. There are, undoubtedly, other situations in which deficiencies in a statutory remedy militate in favour of the granting of an injunction.

[37] In the case before us, there is no basis on which the statutory provisions can be said to be deficient. They provide for inspections and audits, and allow the Commission to seek a warrant when it is necessary to enter a building in order to obtain information. The provisions specifically deal with audits, and are carefully tailored to ensure that they can be carried out. There is no basis, in this case, to expect that the clinics would refuse to allow inspectors access to documents if a warrant were issued. In the circumstances, it was unnecessary to resort to the injunction procedure.

The Scope of an Injunction

[38] While I would set aside the injunction on the basis that the statutory remedies were entirely adequate, I believe that some comment is also appropriate with respect to the scope of the injunction granted in this case. The injunction requires the clinics to permit inspectors to enter the clinics and to inspect records and make copies of them. If the statute had been deficient in this case, an injunction including those provisions might well have been appropriate.

[39] The injunction goes on, however, to prohibit the clinics from "hindering, molesting or interfering with the inspectors". The language appears to have been taken from s. 36(10) of the *Medicare Protection Act*. Unfortunately, it is common practice for parties to seek injunctions and similar orders in very broad terms, often parroting the language of a statute. A court should be cautious in adopting statutory language in an injunction. The purpose of a statute is to govern a wide variety of circumstances. Statutes are therefore often cast in broad terms, designed to cover all foreseeable eventualities. An injunction, on the other hand, should be tailored to an individual case. It is an extraordinary remedy, and anyone who infringes an injunction is subject to the possibility of being found in contempt of court. Injunctions must, of course, be drawn broadly enough to ensure that they will be effective. They should not, however, go beyond what is reasonably necessary to effect compliance.

[40] In the case before us, there is no reason to suspect that the clinics will hinder, molest or interfere with inspectors if a court requires that they submit to inspections. The injunction did not need to include a provision prohibiting such activities, and it should not have done so.

Should the Chambers Judge have Granted a Warrant?

[41] The Commission applied for a warrant under s. 36(7) of the *Medicare Protection Act* to allow its inspectors to enter the clinic premises. Given that the chambers judge should not have issued an injunction, ought she to have, instead, granted a warrant?

[42] In my view, the inclusion of the claim for a warrant in the Commission's counterclaim was not appropriate. The statute contemplates a procedure for applying for a warrant before a justice of the peace. It does not contemplate such an application being by way of a statement of claim (or counterclaim) in a civil suit. I would not rule out the possibility that exceptional circumstances might justify an application for a warrant to be brought within a civil claim. There are, however, no such circumstances in this case. As I have already noted, there is no demonstrated connection between the litigation and the Commission's right to conduct an audit.

[43] The application for a warrant became entangled in the litigation, leading to a great deal of confusion. The parties and the chambers judge seemed, at times, to suggest that an audit could be used for the purpose of discovery in the litigation. In my view, that would not be an appropriate basis for conducting an audit. The statutory provisions allowing for an audit are designed to allow for the

orderly administration and regulation of the Medical Services Plan, not as an adjunct to rights of discovery in litigation.

[44] There was also confusion over how the constitutionality of the legislation impinged on a warrant application. Had the warrant application been brought as a stand-alone application, I think it would have been apparent that the appellants, as persons seeking to be relieved of a burden imposed by statute, would have had the onus of applying to suspend the operation of the audit provisions of the statute, as those provisions relate to them, pending the conclusion of their constitutional challenge. Such an application would have clearly fallen within the scope of *RJR-MacDonald*, and much of the confusion over the applicable test would have been avoided.

[45] As matters now stand, the Commission is entitled, under the statute, to proceed with an audit. If it requires a warrant in order to enter premises so that it can conduct an audit, the *Medicare Protection Act* provides for an application to a justice of the peace for such a warrant. There is no reason that such an application should be part of the current litigation.

[46] If the appellants consider that an audit should not take place pending determination of their constitutional challenge, they are entitled to apply to a judge of the Supreme Court for an order exempting them from the relevant provisions of the *Medicare Protection Act* pending the determination of their challenge. Such an application could properly be brought as an interlocutory application in the extant proceedings. Such an application would clearly be an application for an interlocutory stay, and the *RJR-MacDonald* test would apply.

Conclusion

[47] In the result, I would allow the appeal, and set aside the injunction, without prejudice to:

1) the Commission's right to apply for a warrant in properly constituted proceedings before a justice of the peace.

2) the appellants' rights to apply in the Supreme Court for a limited exemption from particular audit provisions of the *Medicare Protection Act* pending the resolution of the litigation.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Frankel"

APPENDIX

Medicare Protection Act

...

Definitions

1 In this Act:

...

“beneficiary” means a resident who is enrolled ...;

“benefits” means

(a) medically required services rendered by a medical practitioner who is enrolled under section 13, unless the services are determined ... by the commission not to be benefits, ...

(c) unless determined by the commission ... not to be benefits, medically required services performed

(i) in an approved diagnostic facility, and

(ii) by or under the supervision of an enrolled medical practitioner who is acting

(A) on order of a person in a prescribed category of persons, or

(B) in accordance with protocols approved by the commission;

...

“commission” means the Medical Services Commission ...;

...

“payment schedule” means a payment schedule established under section 26;

...

“plan” means the Medical Services Plan ...;

“practitioner” means

(a) a medical practitioner ...

who is enrolled under section 13;

....

Enrollment of practitioners

13(1) A medical practitioner or health care practitioner who wishes to be enrolled as a practitioner must apply to the commission in the manner required by the commission.

(2) On receiving an application under subsection (1), the commission must enroll the applicant if the commission is satisfied that the applicant is in good standing with the appropriate licensing body ....

(3) A practitioner who renders benefits to a beneficiary is, if this Act and the regulations made under it are complied with, eligible to be paid for his or her services in accordance with the appropriate payment schedule ....

Election

14 (1) A practitioner may elect to be paid for benefits directly from a beneficiary.

(2) An election under subsection (1) may be made by giving written notice to the commission in the manner required by the commission.

...

(7) If an election is in effect and the practitioner has complied with subsection (9),

(a) the beneficiary must make a request for reimbursement directly to the commission, and

(b) the beneficiary is only entitled to be reimbursed for the lesser of

(i) the amount that is provided in the appropriate payment schedule for the benefit, ... and

(ii) the amount that was charged by the practitioner.

(8) If a practitioner makes an election under subsection (1), he or she must not submit a claim on his or her own behalf ... for services rendered to a beneficiary after the date the election becomes effective.

(9) As soon as practicable after rendering a benefit, a practitioner who has made an election under subsection (1) must give the beneficiary a claim form that is completed by the practitioner in the manner required by the commission.

...

General limits on direct or extra billing

17 (1) Except as specified in this Act or the regulations or by the commission under this Act, a person must not charge a beneficiary

(a) for a benefit, or

(b) for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of a benefit.

(2) Subsection (1) does not apply:

(a) if, at the time a service was rendered, the person receiving the service was not enrolled as a beneficiary;

(b) if, at the time the service was rendered, the service was not considered by the commission to be a benefit;

(c) if the service was rendered by a practitioner who

(i) has made an election under section 14 (1), ...;

(d) if the service was rendered by a medical practitioner who is not enrolled.

Limits on direct or extra billing by a medical practitioner

18 (1) If a medical practitioner who is not enrolled renders a service to a beneficiary and the service would be a benefit if rendered by an enrolled medical practitioner, a person must not charge the beneficiary for, or in relation to, the service an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service if rendered by an enrolled medical practitioner ....

...

(3) If a medical practitioner described in section 17 (2) (c) renders a benefit to a beneficiary, a person must not charge the beneficiary for, or in relation to, the service an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service ....

Payment schedules and benefit plans

26 (1) The commission

(a) must establish payment schedules that specify the amounts that may be paid to or on behalf of practitioners for rendering benefits under this Act...

Audit and inspection – practitioners and employers

36 (1) In this Part:

...

“practitioner” includes

(a) a former practitioner, and

(b) a medical practitioner who is not enrolled and to whom section 18 (1) applies;

....

(2) The commission may appoint inspectors to audit

(a) claims for payment by practitioners and the patterns of practice or billing followed by practitioners under this Act,

(b) the billing or business practices of persons who own, manage, control or carry on a business for profit or gain and, in the course of the business, direct, authorize, cause, allow, assent to, assist in, acquiesce in or participate in the rendering of a benefit to beneficiaries by practitioners, and

(c) the billing or business practices of persons who own, manage, control or carry on a business for profit or gain and who the commission on reasonable grounds believes

(i) in the course of the business, direct, authorize, cause, allow, assent to, assist in, acquiesce in or participate in the rendering of a benefit to beneficiaries by practitioners, or

(ii) have contravened section 17, 18, 18.1 or 19.

(2.1) If the commission, on behalf of a prescribed agency, pays a practitioner, an owner of a diagnostic facility or a representative of a professional corporation for services rendered, or claimed to have been rendered, this Part applies to the services as though these services were benefits.

(2.2) The claims and patterns of practice or billing concerning a prescribed agency

(a) need not be under this Act, and

(b) can have arisen at any time since July 24, 1992.

(3) Medical records may only be requested or inspected under this section or section 40 by an inspector who is a medical practitioner.

(4) An audit under subsection (2) (a) may be made in respect of claims and patterns of practice or billing followed by practitioners before this Act came into force.

(4.1) An audit under subsection (2) (b) or (c) may be made in respect of billing or business practices followed by persons before the coming into force of this subsection.

(5) An inspector may, at any reasonable time and for reasonable purposes of the audit, enter any premises and inspect

(a) records of a person described in subsection (2) (b) or (c) or of a practitioner, and

(b) records maintained in hospitals, health facilities and diagnostic facilities.

(6) The power to enter a place under subsection (5) or (12) must not be used to enter a dwelling house occupied as a residence without the consent of the occupier except under the authority of a warrant under subsection (7).

(7) On being satisfied on evidence on oath or affirmation that there are in a place records or other things for which there are reasonable grounds to believe that they are relevant to the matters referred to in subsection (5) or (12), a justice may issue a warrant authorizing an inspector named in the warrant to enter the place in accordance with the warrant in order to exercise the powers referred to in subsection (5) or (12).

(8) A person must, on the request of an inspector,

(a) produce and permit inspection of the records referred to in subsection (5) or (12),

(b) supply copies of or extracts from the records at the expense of the commission, and

(c) answer all questions of the inspector respecting the records referred to in subsection (5) or (12).

(9) If required by the inspector, a person must provide to the inspector all books of account and other records that the inspector considers necessary for the purposes of the audit.

(10) A person must not hinder, molest or interfere with an inspector doing anything that the inspector is authorized to do under this section or prevent or attempt to prevent the inspector doing any such thing.

(11) An inspector must make a report to the chair of the results of an audit made under subsection (2).

(12) An inspector may, at any reasonable time and for the purposes of the audit, enter any premises and inspect the payroll, financial and membership records of an employer or an association responsible for collecting and remitting premiums under this Act.

Injunctions

45.1 (1) The commission may apply to the Supreme Court for an injunction restraining a person from contravening section 17 (1), 18 (1) or (3) ....

(2) The court may grant an injunction sought under subsection (1) if the court is satisfied that there is reason to believe that there has been or will be a contravention of this Act or the regulations.

(3) The court may grant an interim injunction until the outcome of an action commenced under subsection (1).

Offences

46 ....

(4) A person who obstructs an inspector in the lawful performance of his or her duties under this Act commits an offence.

TAB 17

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Simard Westlink Inc. v. Wallace,* 2013 BCSC 2218

Date: 20131204
Docket: S134825
Registry: Vancouver

Between:

Simard Westlink Inc.

Petitioner

And

William Wallace

Respondent

Corrected Judgment: The text of this judgment was corrected at paragraphs 10, 23, 24, 26, 27(a), 34, 35 and 65, where changes were made on December 13, 2013.

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Petitioner:	F.C. Gaerdes
The Respondent appearing on his own behalf:	William Wallace, assisted by Jennifer Galloway
Place and Date of Trial/Hearing:	Vancouver, B.C. November 12, 2013
Place and Date of Judgment:	Vancouver, B.C. December 4, 2013

Introduction

[1] The petitioner, Simard Westlink Inc. ("Simard"), seeks a declaration that the respondent, William Wallace, is in breach of a written confidentiality agreement entered into by the parties on July 4, 2011 (the "Confidentiality Agreement"), and a permanent injunction enforcing the duty of confidentiality that Simard alleges is owed to it by Mr. Wallace.

Facts

[2] With one exception, the essential facts are not in dispute. The following summary of the facts is derived from the affidavit of Denis Bertrand which was filed by Simard in support of the petition.

Mr. Bertrand is Simard's Vice President of Operations. Mr. Wallace did not file any affidavits or other evidence.

[3] Simard is in the business of providing warehousing and distribution management services at its warehouse facility in Richmond, British Columbia (the "Warehouse"). Simard guarantees its customers confidential and specialized storage and handling of their goods.

[4] Mr. Wallace was employed by Simard as a warehouseman at the Warehouse between July 4, 2011 and April 2, 2013, when his employment was terminated for cause.

[5] When he was hired, Mr. Wallace signed the Confidentiality Agreement. The Confidentiality Agreement defines "confidential information" in broad terms as meaning:

> … any information which was disclosed to the Employee or that the Employee learned or knows due to the Employee's work for the business of the Employer, and any other information that the Employee obtained or conceived in relation to the business of the Employer. Confidential information includes, without limitation, all documents relating to the business of the Employer, such as trade secrets, technical and financial information, data, models, systems, drawings, plans, lists of clients, as well as the price setting for the products and services of the Employer, and any other written, oral, computerized or graphic information concerning the business of the Employer, its customers and its suppliers.

[6] The Confidentiality Agreement states that "[t]he Employee acknowledges and agrees that any confidential information is and remains the exclusive property of the Employer" and that "the Employee irrevocably promises not to, directly or indirectly, at no time and at no place, use, spread, transfer, communicate, disclose, reproduce or publish any confidential information …".

[7] Finally, the Confidentiality Agreement contains a fairly standard clause whereby the employee acknowledges that in the case of breach the employer will suffer irreparable damage and that monetary compensation will not be an adequate remedy. That clause reads as follows:

> The Employee acknowledges that the foregoing restrictions are reasonable and necessary to protect he [*sic*] legitimate interests of the Employer, that in case of breach of these restrictions, irreparable damages will be caused on a very short time basis to the Employer, that monetary compensation will not be an adequate remedy to the Employer, and that if the Employee discloses any confidential information, the Employee may face judicial proceedings.

[8] On or about February 4, 2012, one of Simard's customers advised Simard that a video on a YouTube website showed footage of the customer's own client's promotional golf balls, which were being stored in the Warehouse. Simard conducted an investigation and discovered that between about September 14, 2011 and March 15, 2013, approximately 93 video and audio recordings (the "Recordings") had been posted on a particular YouTube website (the "Website"). The Recordings were copied onto a DVD disk by Simard, and that disk was attached as an exhibit to Mr. Bertrand's affidavit.

[9] Simard alleges that Mr. Wallace controls the Website and that he posted the Recordings to it. This is the one factual question in dispute. Mr. Wallace has not actually denied that he controls the Website or that he posted the Recordings to it. His response to the petition does not contain any such denial and, as noted above, he has not filed any evidence in response to the petition. However, during oral

submissions, he took the position that Simard had not satisfied the burden placed on it to establish that it is Mr. Wallace who actually controls the Website and posted the Recordings.

[10] All of the Recordings contain information concerning Simard's business. Many of the Recordings and the titles assigned to them on the Website disclose identifying information about Simard's customers, their products, and/or their brand names. Some of the Recordings contain negative or derogatory comments about Simard, its customers, and its employees. Some of the Recordings depict the unauthorized and unprofessional handling of customers' products by some of Simard's employees. For example, in one video, the title of which contains the brand name of one of Simard's customers, employees can be seen removing some straps or ropes that had been holding a number of vertical boxes upright, thereby allowing the boxes to topple to the ground. In another video, the title of which contains the name of another of Simard's customers, an employee can be seen opening a large door behind which some boxes were stacked thereby allowing the boxes to fall. In one of the Recordings, Mr. Wallace can be seen, through the side mirror of a vehicle, holding the video camera that is being used to make the video.

[11] Simard cannot itself remove or delete the Recordings from the Website.

[12] On or about March 19, 2013, Mr. Bertrand met with Mr. Wallace and asked him to remove the Recordings from the Website. Mr. Bertrand subsequently discovered that only two of the Recordings had been removed, one showing Mr. Wallace's face and the other showing Mr. Wallace sitting in a container in the Warehouse smoking, which is contrary to Simard's rules for employees.

[13] Counsel for Simard then sent Mr. Wallace, by email and courier, a demand that he remove the Recordings from the Website but Mr. Wallace did not respond. Subsequent voicemail messages left for Mr. Wallace by Simard's counsel were not returned.

[14] Counsel for Simard also asked YouTube, LLC to delete the Recordings but YouTube, LLC has declined to do so.

[15] On April 22, 2013, Simard received a letter of complaint from one of its customers advising that it had become aware that videos of its client's product had been posted on the Website. The letter reads, in material part, as follows:

> It has been brought to our attention that one of your employees has filmed and uploaded numerous videos of your staff handling our client's product … in an unprofessional manner to YouTube. As you should be well aware this action makes the videos available to the general public. Our client … is deeply concerned about the effect these videos may have on their brand. On behalf of our client … we are requesting that you take necessary action to have these videos taken down from YouTube immediately.
>
> This display of employee unprofessionalism is concerning as your company… represents [us]. We expect our partners to abide by the same level of service and integrity that we guarantee to our clients. Our customers trust that confidentiality is a key component to our service and in this case it failed.
>
> Please ensure that all efforts are taken to resolve this situation and that it will not happen again.

[16] Mr. Bertrand deposed that Simard has earned approximately $250,000 annually from the services it provides to this particular customer but this customer has not placed any business with Simard since it discovered the Recordings on the Website.

[17] On June 27, 2013, Simard commenced this petition proceeding pursuant to R. 2-1(2)(c) of the *Supreme Court Civil Rules*, which mandates that form of proceeding where the sole or principal question at issue is alleged to be the construction of an oral or written contract. The orders sought in the petition include a declaration that Mr. Wallace is in breach of the Confidentiality Agreement, an order directing Mr. Wallace to permanently remove each of the Recordings from the Website, an order directing Mr. Wallace to provide Simard with a written list of any other audio and video recordings made by Mr. Wallace at the Warehouse and/or that mention Simard or any of its customers, a variety of other ancillary orders, an order requiring Mr. Wallace to confirm by way of sworn affidavit that he has complied with the other orders sought, and costs. Simard is not seeking damages.

[18] On July 23, 2013, Mr. Wallace filed a response to the petition in which he consented to the order sought by Simard directing him to permanently remove each of the Recordings from the Website. He opposed the granting of the balance of the orders sought. Part 4 of Mr. Wallace's response, which requires a brief summary of the material facts on which Mr. Wallace relies, reads in its entirety as follows:

> [P]ublic Access to policyies [*sic*] and standards @ Simard not within standard of care.
> Public safety and danger.

[19] Part 5 of the response, which requires a brief summary of the legal basis on which Mr. Wallace relies, reads in its entirety as follows:

> Federal law
> WCB Reg

[20] The petition was originally scheduled for hearing in August 2013. Shortly before the scheduled hearing date, Mr. Wallace retained counsel who requested that the matter be adjourned. It was adjourned by consent to September 23, 2013.

[21] Mr. Wallace then terminated his relationship with his lawyer. On September 23, 2013, he appeared before Mr. Justice Groves and sought an adjournment to permit him to retain new counsel. Mr. Justice Groves granted the adjournment to October 23, 2013, but also granted Simard interlocutory injunctive relief requiring Mr. Wallace to temporarily remove each of the Recordings from the Website until the petition had been heard.

[22] Counsel for Simard advised the court during oral submissions that following the granting of the interlocutory injunction by Mr. Justice Groves, the Recordings were removed from the Website.

[23] The matter then came on for hearing on October 23, 2013, before Madam Justice Gropper. Mr. Wallace again sought an adjournment on the basis that he wished to retain counsel. Madam Justice Gropper granted the further adjournment and also granted Simard interlocutory injunctive relief

prohibiting Mr. Wallace from re-uploading the Recordings onto the Website until the petition had been heard.

[24] On or about November 5, 2013, another one of Simard's customers sent Simard a copy of a letter dated October 21, 2013, that had been received by that customer and appeared on its face to be from Mr. Wallace. This letter alleged that the customer's food products were being stored with "lethal Sodium Cyanide", enclosed a copy of a file that had been posted to the Website, and enclosed a copy of the affidavit sworn by Mr. Bertrand in support of this petition. This letter was attached as an exhibit to an affidavit of Jason Hansen sworn on November 8, 2013.

[25] Mr. Hansen is employed as Simard's Director of Operations. In that role, he has responsibility for the handling of all freight including dangerous goods. He is certified as a Transportation of Dangerous Goods Instructor by the British Columbia Trucking Association. He deposed that all Simard employees who handle dangerous goods have been trained to do so and have a valid competency certificate. He deposed that all dangerous goods in the Warehouse are handled by Simard employees in accordance with relevant legislation and regulations, are kept in designated areas away from food products at all times, and are properly sealed and wrapped and visibly marked with caution tape.

Positions of the Parties

[26] Simard's position is that the Recordings fall within the definition of "confidential information" in the Confidentiality Agreement, and that Mr. Wallace breached the Confidentiality Agreement and the duty of loyalty and good faith implied in every contract of employment by posting the Recordings on the Website and by sending the letter referred to in paragraph 24 above. Simard asserts that it is entitled to a permanent injunction to prevent the recurrence of the wrong. Simard submits that, in this case, damages are not an appropriate remedy as Mr. Wallace is unlikely to be able to satisfy any monetary award and, in any event, if the Recordings are not permanently deleted from the Website and removed from Mr. Wallace's control, Simard will be exposed to continuing harm.

[27] Mr. Wallace advances three alternative positions, as follows:

a) First, Mr. Wallace asserts that Simard has not established that he posted the Recordings to the Website or that he controls the Website. He did not mention the letter in oral submissions.

b) Second, Mr. Wallace asserts that the Confidentiality Agreement is unenforceable because there is a mistake in the clause whereby the employee acknowledges that in the case of breach the employer will suffer irreparable damage. As noted above, that clause reads in part as follows:

> The Employee acknowledges that the foregoing restrictions are reasonable and necessary to protect he [*sic*] legitimate interests of the Employer …

Mr. Wallace asserts that the use of the word "he" rather than "the" in this sentence renders the Confidentially Agreement unenforceable because it could cause an employee to think that "his" interests were being protected by the Confidentiality Agreement, rather than the employer's interests.

c) Third, Mr. Wallace asserts that by attaching the disk containing the Recordings to Mr. Bertrand's affidavit and filing that affidavit in court, Simard has made the Recordings public and, as a result, an injunction enjoining Mr. Wallace from disclosing the Recordings would be pointless.

Issues

The following issues arise:

1. Has Simard established that Mr. Wallace posted the Recordings to the Website and/or that Mr. Wallace controls the Website?

2. Did Mr. Wallace breach a duty owed to Simard not to disclose Simard's confidential information?

3. If so, what is the appropriate remedy?

Analysis

Has Simard established that Mr. Wallace posted the Recordings and/or that Mr. Wallace controls the Website?

[28] Mr. Bertrand deposes in his affidavit that Simard was alerted to the Recordings on the Website by one of its customers, and that as a result Mr. Bertrand caused an investigation to be conducted. His affidavit in this regard continues as follows:

> Through this investigation I discovered that between about September 14, 2011 and March 15, 2013, the Respondent, in breach of the Confidentiality Agreement, recorded and posted about 93 video and audio recordings on the YouTube website … through his personal YouTube account.

[29] Mr. Bertrand provided no further details. In particular, he did not explain the basis for his conclusions that it was Mr. Wallace who posted the Recordings and that the YouTube account in issue is Mr. Wallace's account. Mr. Wallace submits that Mr. Bertrand's evidence on these points is hearsay and as such is insufficient to establish that Mr. Bertrand posted the Recordings to the Website.

[30] As noted above, Mr. Wallace filed no affidavit material. Further, he did not deny posting the Recordings or controlling the Website in Part 4 of his response to the petition, in which he is required to set out a brief summary of the material facts on which he relies.

[31] In Part 1 of his response to the petition, Mr. Wallace consented to the order sought by Simard directing him to permanently remove each of the Recordings from the Website. Simard's position is that this is tantamount to an admission by Mr. Wallace that he controls the Website. Simard also points out that following the interlocutory injunction granted by Mr. Justice Groves, the Recordings were removed from the Website. From this, says Simard, it can be inferred that Mr. Wallace controls the Website.

[32] Simard bears the burden of establishing, on a balance of probabilities, that Mr. Wallace breached a duty of confidentiality. While Mr. Bertrand's affidavit alone would not, in my view, be sufficient to satisfy that burden, I agree with Simard's submission that by consenting to an order requiring him to

permanently remove the Recordings from the Website, Mr. Wallace has admitted that he controls the Website. While the evidence does not establish that Mr. Wallace personally posted the Recordings, I conclude, on the basis of his admission, that he controls the Website.

[33] I have considered whether, as a result of Mr. Wallace raising this factual issue, the matter should have been referred to trial pursuant to R. 22-1(7). An originating application under R. 2-1(2) is inappropriate where there is a dispute as to facts or law that raises a reasonable doubt or that suggests there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (C.A.). However, given the admission made by Mr. Wallace in his response to the petition, neither a reasonable doubt, nor a defence deserving to be tried, has arisen with respect to whether Mr. Wallace controls the Website. In my view, no purpose would be served by putting the parties to the additional cost associated with referring the matter to trial.

Did Mr. Wallace breach a duty owed to Simard not to disclose Simard's confidential information?

[34] Simard's position is that the Recordings fall within the definition of "confidential information" in the Confidentiality Agreement, and that Mr. Wallace breached the Confidentiality Agreement and the duty of loyalty and good faith implied in every contract of employment by posting them on the Website and by sending the letter to Simard's customer.

[35] The existence of the letter came to light only recently and so was not referred to in the petition. Although Mr. Wallace did not deny sending it, he was not aware that Simard was going to be relying on it until he was provided with a copy of Mr. Hansen's affidavit shortly before the hearing of the petition. Given the hearsay nature of the letter, I am not prepared to rely on it as establishing a breach by Mr. Wallace of a duty he owed to Simard.

[36] Although the evidence does not establish that Mr. Wallace personally posted the Recordings, it has been established that the Recordings were posted on the Website by someone and that the Website is controlled by Mr. Wallace.

[37] In my view, the recordings fall within the definition of confidential information in the Confidentiality Agreement. As stated above, all of the Recordings contain information concerning Simard's business. Many of the Recordings and the titles assigned to them on the Website disclose identifying information about Simard's customers, their products, and/or their brand names. Some of the Recordings contain negative or derogatory comments about Simard, its customers, and its employees. Some of the Recordings depict the unauthorized and unprofessional handling of customers' products by some of Simard's employees. The Recordings clearly consist of "information that [Mr. Wallace] obtained or conceived in relation to the business of [Simard]" and/or "computerized or graphic information concerning the business of [Simard]".

[38] Whether or not Mr. Wallace personally posted the Recordings to the Website, it is my view that he breached the obligation imposed upon him in the Confidentiality Agreement not to "use, spread, transfer,

communicate, disclose, reproduce or publish any [of Simard's] confidential information" by permitting them to be posted to and remain on a Website that he controls.

[39] The next question is whether the Confidentiality Agreement is unenforceable as a result of the typographical error identified by Mr. Wallace in his submissions. Mr. Wallace does not claim to have been confused or misled by the Confidentiality Agreement. As already noted, he led no evidence. His position is simply that the error could have been confusing and, as such, the Confidentiality Agreement should not be enforced.

[40] In my view, the typographical error provides no basis for finding the Confidentiality Agreement to be unenforceable. First, the error is located in the clause in which the employee acknowledges that in the case of breach the employer will suffer irreparable damage. It has no effect on the core confidentiality obligation assumed by the employee which is found in the preceding paragraph of the Confidentiality Agreement.

[41] Second, in any event, the error does not result in any ambiguity in my view. The Confidentiality Agreement is certain with respect to all its essential terms. It cannot be said that the Confidentiality Agreement, read as a whole, could have been interpreted as protecting the interests of the employee. Such an interpretation would be directly inconsistent with the core term of the Confidentiality Agreement which states expressly and clearly that "[t]he Employee irrevocably promises not to, directly or indirectly, at no time and at no place, use, spread, transfer, communicate, disclose, reproduce or publish any confidential information …".

[42] For the foregoing reasons, I conclude that the Confidentiality Agreement is enforceable against Mr. Wallace and that he breached it by permitting the Recordings to be posted to and remain on the Website.

[43] In addition to the duties imposed by the Confidentiality Agreement, Mr. Wallace owed Simard an implied duty of loyalty and good faith, including an obligation not to disclose confidential information, which continues notwithstanding the cessation of the employment relationship: Gregory K Steele & Kenneth W Thornicroft, *Employment Obligations and Confidential Information*, 2d ed (Markham, ON: LexisNexis Canada Inc., 2009) at 39-40; Geoffrey England, *Individual Employment Law*, 2d ed (Toronto: Irwin Law Inc., 2008) at 74-75.

[44] The difficulty arises in identifying what constitutes confidential information to which this implied duty applies. Although all of the Recordings contain information concerning Simard's business and, as such, fall within the broad definition of confidential information in the Confidentiality Agreement, it is not necessarily the case that all of the Recordings would attract the duty of confidence implied in every employment contract. However, given my conclusion that Mr. Wallace breached the Confidentiality Agreement, it is not necessary to determine whether Mr. Wallace also breached the implied duty.

What is the appropriate remedy?

[45] As noted above, Simard seeks a declaration that Mr. Wallace is in breach of the Confidentiality Agreement and asserts that it is entitled to a permanent injunction to prevent the recurrence of the wrong.

[46] For the reasons already given, Simard is entitled to the declaration it seeks.

[47] In a petition proceeding, the court is empowered to grant both declaratory and injunctive relief: *Great Canadian Casino Company Ltd. v. Surrey (City)*, [1998] B.C.J. No. 1188 (S.C.); *Surrey (City) v. Holden*, [1995] B.C.J. No. 753 (S.C.); and *Kaiser Resources Ltd. v. Western Canada Beverage Corporation* (1992), 71 B.C.L.R. (2d) 236 (S.C.).

[48] Having established that Mr. Wallace is in breach of the Confidentiality Agreement, absent special circumstances, Simard is generally entitled to a permanent injunction to prevent the recurrence of the wrong: *J.M. Steeves Dairy Limited v. Twin City Co-operative Milk Producers Association* (1925), 36 B.C.R. 286 (S.C.), para. 24.

[49] The court will order a permanent mandatory injunction if it is just or convenient to do so. The nature of the wrong, the availability of other sanctions, and the relative effectiveness of those sanctions are matters the court normally considers in deciding whether to grant such an injunction: *Agricultural Land Commission v. Munro*, 2006 BCSC 1408, para. 105.

[50] In evaluating whether the court ought to exercise its discretion to grant permanent injunctive relief, some of the evidence that would be used to evaluate an application for interlocutory injunctive relief might also be considered. For example, irreparable harm is not, *per se*, relevant to the granting of a final or permanent injunction; however, some of the evidence that would be used to establish it on an interlocutory injunction application might still be considered: *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, para. 28.

[51] Mr. Wallace asserts that by attaching the disk containing the Recordings to Mr. Bertrand's affidavit and filing that affidavit in court, Simard has made the Recordings public and, as a result, an injunction enjoining Mr. Wallace from disclosing the Recordings would be pointless. I disagree. Simard had no choice but to file the disk containing the Recordings in support of its petition. It is extremely unlikely that anyone would be inclined to attend the court registry for the purpose of obtaining and viewing the disk. In the unlikely event that the presence of the disk in the court file became a real concern for Simard, an application could be made to have the file sealed. In contrast, the evidence discloses that at least two of Simard's customers are already aware of the Recordings on the Website, and that one of those customers has ceased doing business with Simard since discovering the Recordings.

[52] I am satisfied that a permanent injunction is the appropriate remedy in this case. Mr. Wallace obtained an order waiving court fees on the basis that he is impoverished. The affidavit he filed in support of that order disclosed that he is receiving employment benefits and has a monthly income of $610. As noted above, Simard has not sought damages in this petition proceeding and the reality is that Mr. Wallace is not in a position to satisfy a damages award of any significant magnitude. More importantly, a damages award alone would not be an appropriate or effective remedy because the

continued presence of the Recordings, if not permanently deleted from the Website, would continue to threaten harm to Simard's business reputation and would constitute a continuing breach of the Confidentiality Agreement.

[53] As already noted, in his response to the petition, Mr. Wallace consented to an order that he "… take all such steps as are necessary to permanently remove each [of the Recordings] from the [Website]". However, he opposes the other specific orders sought by Simard including an order that he be enjoined from "re-posting or uploading onto the [Website], or any other website or social media platform, any of the [Recordings]". The only reasonable explanation for his failure to consent to the term prohibiting him from re-posting the Recordings is that he intends to re-post them or to otherwise disclose them.

[54] In the circumstances, a permanent injunction is just.

[55] The specific terms of the order sought by Simard were set out in a draft order presented by Simard's counsel, a copy of which is attached to this judgment as Schedule 1. I will address each of the paragraphs in that draft order below. However, the specific terms of the order I am granting are set out in the conclusion section of this judgment.

[56] Paragraph 1 of the draft order attached as Schedule 1 is a declaration that Mr. Wallace is in breach of the Confidentiality Agreement. That order is granted, but with amendments to clarify that the breach consisted of permitting the Recordings to be posted to and remain on the Website.

[57] Paragraph 2 of the draft order is an injunction requiring Mr. Wallace to permanently remove and delete the Recordings from the Website within five days of the order being granted. As noted above, the interlocutory injunction granted by Mr. Justice Groves required Mr. Wallace to temporarily remove the Recordings from the Website. For the reasons given above, it is appropriate that they be permanently removed and deleted and, as such, paragraph 2 of the draft order is granted, although with additional language requiring Mr. Wallace to also delete the Recordings from any other website or social media platform that he controls.

[58] Paragraph 3 of the draft order would require Mr. Wallace to provide Simard with a written list of any audio and video recordings, in addition to the 93 recordings that are the subject of paragraph 2 of the draft order, that were made by Mr. Wallace at the Warehouse and/or that mention Simard or any of its customers and are currently in Mr. Wallace's possession or under his control (the "Additional Recordings"), and to indicate on that list whether any of the Additional Recordings have been posted or uploaded onto the Website or any other website or social media platform that he controls. As noted above, the Confidentiality Agreement contains an express acknowledgment that Simard's confidential information "is and remains the exclusive property of [Simard]". In the circumstances, it is appropriate that Mr. Wallace be required to advise Simard of any Additional Recordings in his possession. As such, paragraph 3 of the draft order is granted, with additional language requiring Mr. Wallace to also advise Simard if no Additional Recordings exist.

[59] Paragraph 4 of the draft order would require Mr. Wallace to permanently delete and remove any of the Additional Recordings that have been posted to the Website or any other website. It is my view that such an order would be premature. Until it is known whether any such Additional Recordings exist and, if so, whether they fall within the broad definition of confidential information in the Confidentiality Agreement, any further orders in relation to the Additional Recordings would be premature. As such, paragraph 4 of the draft order is not granted.

[60] Paragraph 5 of the draft order would require Mr. Wallace to provide Simard with the original copy of each of the Recordings and the Additional Recordings. Simard already has a copy of each of the Recordings and, in my view, nothing is to be gained by requiring Mr. Wallace to provide Simard with the originals. On the other hand, Simard will require a copy of any Additional Recordings in order to assess whether any of them fall within the definition of confidential information in the Confidentiality Agreement as noted above. As such, I will grant an order requiring Mr. Wallace to provide Simard with a copy of any Additional Recordings that exist.

[61] Paragraph 6 of the draft order would require Mr. Wallace to permanently delete and destroy any copies of the Recordings and the Additional Recordings, including the disk attached to Mr. Bertrand's affidavit which was served on Mr. Wallace in support of the petition. For the reasons given, I will grant that order in relation to the Recordings but I am of the view that it is premature in relation to the Additional Recordings.

[62] Paragraph 7 of the draft order would require Mr. Wallace to serve on Simard and also file with the court a sworn affidavit confirming that he has complied with paragraphs 2 through 6 of the draft order. Not all of those paragraphs of the draft order have been granted and some have been granted in terms that are somewhat different than the terms sought. In the circumstances, requiring an affidavit is, in my view, appropriate but in the specific terms set out below in the conclusion section of this judgment.

[63] Paragraph 8 of the draft order would enjoin Mr. Wallace from distributing or providing to any person other than Denis Bertrand and Simard's counsel any of the Recordings and any Additional Recordings. For the reasons given, I will grant that order in relation to the Recordings but I am of the view that it is premature in relation to the Additional Recordings.

[64] Paragraph 9 of the draft order would enjoin Mr. Wallace from re-posting or uploading onto the Website, or any other website or social media platform, any of the Recordings and any Additional Recordings. For the reasons given, I will grant that order in relation to the Recordings but I am of the view that it is premature in relation to the Additional Recordings.

[65] Paragraph 10 of the draft order would enjoin Mr. Wallace from publishing or communicating any defamatory statement referring in any way to Simard, its officers, directors, employees, or affiliated persons or entities, whether by name, pseudonym, address, video or audio recording, photograph, or any other means of identity. Simard asserted that this order was justified on the basis that the letter sent to Simard's customer constituted defamation. While I accept that in cases where defamation has been established, this kind of permanent injunction may be an appropriate remedy, the question of whether

Mr. Wallace is liable for defamation does not arise on this petition. Defamation is not pleaded in the petition and, in any event, an allegation of defamation would have to be pursued by way of action rather than originating application. In the circumstances, this order will not be granted.

[66] Paragraph 11 of the draft order would require Mr. Wallace to provide Simard with a written list of all clients or customers of Simard to which he has addressed any correspondence concerning the Recordings, together with copies of any such correspondence in his possession or control. For the reasons given, I will grant that order.

[67] Paragraph 12 of the draft order would require Mr. Wallace to pay Simard's costs of the petition and also Simard's costs relating to the interlocutory applications heard on August 30, 2013, September 18, 2013, September 23, 2013, and October 23, 2013. No submissions were made at the hearing of the petition in relation to costs and there is no evidence before me as to the nature or outcome of the applications that were heard on August 30, 2013, or September 18, 2013. In the circumstances, Simard shall have its costs assessed as party and party costs in accordance with Appendix B of the *Rules*. The costs of all applications shall be determined in accordance with R. 14-1(12).

[68] Paragraph 13 of the draft order would dispense with the requirement that Mr. Wallace approve the form of the order. In my view, that order is appropriate in the circumstances.

Conclusion

[69] I have concluded that the Confidentiality Agreement is enforceable against Mr. Wallace and that he breached it by permitting the Recordings to be posted to and remain on the Website. I have also concluded that a permanent injunction is the appropriate remedy in this case.

[70] Simard is entitled to an order in the following terms:

> 1. The respondent, William Wallace ("Mr. Wallace"), by permitting the recordings listed on annexure "A" to this order (the "Recordings") to be posted to and remain on the YouTube website (the "Website"), is in breach of the confidentiality agreement that Mr. Wallace signed on July 4, 2011 (the "Confidentiality Agreement').
>
> 2. Within five days of pronouncement of this order, Mr. Wallace shall:
>
> > a) permanently remove and delete each one of the Recordings from the Website and from any other website or social media platform controlled by him;
> >
> > b) provide the petitioner, Simard Westlink Inc. ("Simard"), with a written list of any audio or video recordings, other than the Recordings that are the subject of paragraph 2(a) of this order, that were made by Mr. Wallace on Simard's premises at 16062 Portside Road, Richmond, British Columbia, and/or that mention Simard or any of its customers and are currently in Mr. Wallace's possession or under his control (the "Additional Recordings"), and indicate on that list whether any of the Additional Recordings have been posted or uploaded onto the Website or any other website or social media platform controlled by

Mr. Wallace, or, if no such Additional Recordings exist, then advise Simard in writing that none exist;

c) provide Simard with a copy of any Additional Recordings;

d) permanently delete and destroy the originals and all copies of the Recordings in his possession or under his control, including the copies of the Recordings contained on the disk attached to the affidavit of Denis Bertrand sworn on June 24, 2013; and

e) provide Simard with a list of all clients and/or customers of Simard to which he has addressed any correspondence concerning the Recordings, together with copies of any such correspondence in his possession or control.

3. Within ten days of pronouncement of this order, Mr. Wallace shall serve on Simard and file with the court a sworn affidavit confirming that he has complied with paragraph 2 of this order.

4. Mr. Wallace is hereby enjoined and prohibited from disclosing, distributing or providing any of the Recordings to any person other than Denis Bertrand and/or Simard's counsel, Fritz C. Gaerdes of Elgin, Cannon & Associates.

5. Mr. Wallace is hereby enjoined and prohibited from re-posting or uploading any of the Recordings to the Website, or to any other website or social media platform.

6. Simard shall have its costs of this proceeding assessed as party and party costs in accordance with Appendix B of the *Supreme Court Civil Rules*. The costs of all applications shall be determined in accordance with R. 14-1(12).

7. The requirement that Mr. Wallace approve the form of this order is dispensed with.

"Warren J."

SCHEDULE 1

Draft Order

No.: S-134825
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SIMARD WESTLINK INC.

PETITIONER

AND:

WILLIAM WALLACE

RESPONDENT

ORDER MADE AFTER PETITION

BEFORE THE HONOURABLE JUSTICE..... [12 November 2013]

ON THE PETITION of Simard Westlink Inc. coming on for hearing at Vancouver, British Columbia on 12 November 2013 and on hearing Fritz Gaerdes, counsel for Simard Westlink Inc., and William Wallace;

THIS COURT ORDERS that:

1. The Respondent, William Wallace (the "Respondent"), by posting on the YouTube website the audio and video recordings listed on annexure "**A**" to this order (the "Recording List"), is in breach of the confidentiality agreement that the Respondent signed and agreed to on July 4, 2011 (the "Confidentiality Agreement").

2. The Respondent permanently remove and delete from the YouTube website each one of the audio and video recordings listed on annexure "**A**" to this order (the "Recording List"), within five (5) days from this order.

3. The Respondent provide the Petitioner, Simard Westlink Inc. ("Simard"), with a written list of any audio and video recordings made by the Respondent on Simard's premises at 16062 Portside Road, Richmond, B.C. and/or that mentions Simard or any of its customers currently in the Respondent's possession or under his control (the "Additional Recording List"), and also indicate on that list whether any recording listed thereon has been posted or uploaded onto the YouTube website or any other website social media platform, within five (5) days of from this order.

4. The Respondent permanently delete and remove each one of the audio and video recordings listed on the Additional Recording List from the YouTube website or any other website on which they may have been posted, within five (5) days from this order.

5. The Respondent provide Simard with each original video or audio recording listed on the Recording List and the Additional Recording List currently in his possession or under his control, within five (5) days from this order.

6. The Respondent, within five (5) days from this order, permanently delete and destroy any copies of each video or audio recording listed on the Recording List and the Additional Recording List currently in his possession or under his control, including the copies of those recordings contained on the CD attached to the affidavit of Denis Bertrand of June 24, 2013, which affidavit Simard served on the Respondent in support of the Petition.

7. The Respondent serve on Simard, and also file with the Court, a sworn affidavit confirming that he has fully complied with the orders set out in paragraphs 2-6 above, within ten (10) days from this order.

8. The Respondent is enjoined and prohibited from distributing or providing to any person other than Denis Bertrand of Simard, or Simard's counsel, Fritz C. Gaerdes of Elgin, Cannon & Associates, any of the video or audio recordings listed on the Recording List and the Additional Recording List.

9. The Respondent is enjoined and prohibited from re-posting or uploading onto the YouTube website, or any other website or social media platform, any of the video or audio recordings listed on the Recording List and the Additional Recording List.

10. The Respondent, his agents, servants or anyone acting on his behalf is enjoined and prohibited from publishing or communicating on the internet or by any other method or medium, or causing to be so published or communicated, any defamatory statement referring in any way to Simard, its officers, directors,

employees or affiliated persons or entities, whether by name, pseudonym, address, video or audio recording, photograph or any other means of identity.

11. The Respondent provide the Simard with a written list of all clients of customers of Simard to which he has addressed any correspondence concerning the Recordings, together with copies of such correspondence in his possession or control, within five (5) days from this order.

12. The Respondent pay Simard's costs of the Petition and also Simard's costs relating to the interlocutory applications heard on August 30, 2013, September 18, 2013, September 23, 2013 and October 23, 2013.

13. The requirement that the Petition Respondent, William Wallace, approves the form of the order is dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

.....

Signature of: Fritz C. Gaerdes

[ ] party [**X**] lawyer for Simard Westlink Inc.

By the Court.

.....

Registrar

[Annexure A removed for publishing purposes]

TAB 18

COURT OF APPEAL FOR ONTARIO

CITATION: 1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd., 2014 ONCA 125
DATE: 20140218
DOCKET: C57291

MacPherson, Gillese and Hourigan JJ.A.

BETWEEN

1711811 Ontario Ltd. and Olga Maria Paiva, Operating as AdLine

Applicants (Respondents)

and

Buckley Insurance Brokers Ltd., Robert Buckley and 1730849 Ontario Ltd.

Respondents (Appellants)

Jonathan L. Rosenstein, for the appellants

Sara J. Erskine, for the respondents

Heard: January 22, 2014

On appeal from the order of Justice Susan G. Himel of the Superior Court of Justice, dated May 31, 2013, with reasons reported at 2013 ONSC 1512.

Gillese J.A.:

[1] The order that spawned this appeal is a very restrictive permanent injunction relating to the use of a laneway. In my view, it was an error to have ordered a permanent injunction. Consequently, I would allow the appeal.

BACKGROUND

[2] AdLine is a t-shirt printing business in Newmarket, Ontario. Olga Maria Paiva owns the business and operates it from a building located at 255 Main Street South. The building is owned by 1711811 Ontario Ltd. In these reasons, I will refer to AdLine, Olga Maria Paiva and 1711811 Ontario Ltd. collectively as "AdLine" or the "Respondents".

[3] Robert Buckley owns Buckley Insurance Ltd., which operates out of a building located at 247 Main Street South in Newmarket. 1730849 Ontario Ltd owns the building. I will refer to Robert Buckley, Buckley Insurance Ltd. and 1730849 Ontario Ltd. collectively as "Buckley" or the "Appellants".

[4] AdLine and Buckley are neighbours. They share the use of a laneway that runs at the rear of their buildings. The laneway provides both with shipping access.

[5] Buckley purchased the property on which the laneway is located in 2008. AdLine has a registered right of way over the laneway.

[6] The right of way, which has existed since 1957, gives AdLine:

> a free and uninterrupted right-of-way in common with all other persons entitled thereto for persons, animals and vehicles, in, over, along and upon that certain parcel of land….

[7] The laneway runs across Buckley's property. A portion of it passes beneath a ceiling that connects the building's east and west wings. The laneway

then feeds into a loading bay located on the side of AdLine's building. The loading bay is AdLine's only point of access for items that it sends and receives.

[8] In May 2009, Buckley notified AdLine that it intended to renovate the laneway because it was in a state of disrepair.

[9] AdLine voiced concerns that the laneway would be obstructed during the renovation period, and that the clearance height of the underpass would be affected.

[10] On May 15, 2009, AdLine brought an application (the "Application") seeking, among other things, a declaration of its rights to the laneway and injunctive relief to prevent Buckley from constructing on, or obstructing, the laneway.

[11] Before the Application was heard, the parties arrived at an agreement that resolved their dispute. On May 20, 2009, Pollak J. issued a consent order based on that agreement (the "Consent Order").

[12] Under the terms of the Consent Order, Buckley would not block vehicular access during business hours and would give AdLine advance notice when such blockage was unavoidable. The Consent Order expressly dismissed the Application. It did not contain an expiry date.

[13] The renovations to the laneway were completed in 2009.

THE CONTEMPT MOTION

[14] The conflict between the parties subsided in the period following the Consent Order. However, in 2011, Buckley began further construction. Disputes again arose between the parties regarding the laneway. AdLine complained that Buckley was: obstructing its use of the laneway by allowing vehicles to park in it; leaving ajar the metal shipping doors that open into the laneway; engaging in construction that changed the clearance height of the underpass and the width of the laneway; and, failing to provide adequate notice of interruptions to vehicular access in the laneway.

[15] AdLine filed a notice of motion dated October 3, 2012, within the Application proceeding, asking the court to find Buckley in contempt of the Consent Order and to grant “mandatory” injunctive relief beyond the terms of the Consent Order (the “Contempt Motion”).

[16] Buckley responded with affidavit evidence which painted a dramatically different version of events. The Buckley affidavit evidence showed that Buckley had acted reasonably throughout and that it was AdLine who acted unreasonably in respect of the laneway.

[17] In his affidavit, Robert Buckley testified, among other things, that other businesses had a right to use the laneway for loading and unloading. He said that he had had no difficulty with these third-party businesses, however, the third

parties had experienced many difficulties with AdLine's demands in respect of the laneway. One such third party was a florist that operated at 245 Main Street South in Newmarket. Affidavits from the florist and one of its suppliers, attached to the Buckley affidavit, supported Buckley's version of events.

[18] In his affidavit, Mr. Buckley also responded to AdLine's allegations in the Contempt Motion. He set out the steps that had been taken to accommodate AdLine during the construction period and attached supporting affidavit evidence to that effect from those involved in the construction. He also gave evidence about his employees' need to use the laneway to access their cafeteria and fitness facility, as well as the public parking areas at the rear of the building. He denied that the opening of the metal shipping doors materially impedes access to the laneway.

[19] On November 20, 2012, in response to what it perceived to be persistent obstruction of the laneway, AdLine brought an *ex parte* motion for interim injunctive relief and to set an expedited hearing date for the Contempt Motion. Buckley's counsel was notified.

[20] The parties appeared before Low J. on November 21, 2012. The matter was adjourned to December 10, 2012.

[21] On December 10, 2012, Stinson J. ordered interim injunctive relief, pending argument on the Contempt Motion, and fixed February 27, 2013, as the hearing date for that motion (the “Interim Order”).

[22] Under the Interim Order, Buckley was required to provide AdLine with reasonable, unimpeded access to the laneway. As well, Buckley was ordered to ensure that none of its employees or those under its control parked on the laneway, with a 30-minute exemption being made for vehicles actively delivering goods to, or receiving goods from, Buckley’s premises. In the event that a vehicle parked in the laneway in violation of the Interim Order, AdLine was to notify Buckley and Buckley was to take immediate steps to have the offending vehicle moved or removed. If that did not occur, AdLine was given the power to tow the offending vehicle, with a right to recover that expense from Buckley. Further, Buckley’s employee entrance doors and shipping doors were required to remain closed when not in active use.

THE DECISION BELOW

[23] The order under appeal flowed from three endorsements made by the motion judge. In light of the issues raised on appeal, it is necessary to consider all three endorsements.

The First Endorsement

[24] In reasons dated March 12, 2013 (the "First Endorsement"), the motion judge allowed the Contempt Motion in part; she dismissed that part of the motion seeking to have Buckley found to be in contempt, but she granted that part in which AdLine sought further injunctive relief.

[25] The motion judge refused to make a finding of contempt because she was not satisfied beyond a reasonable doubt that the Consent Order was in effect during the most recent bout of conflict between the parties. In her view, the Consent Order was a response to the specific circumstances concerning Buckley's proposed renovations to the laneway in 2009. As she noted, if she were unable to know with certainty whether the Consent Order was operative after those renovations had been completed, how could Buckley? And if there were no order in place, then contempt could not be found.

[26] In relation to the order for further injunctive relief, for reasons that will become clear, it is necessary to consider the motion judge's reasons in more detail.

[27] At the outset of the First Endorsement, the motion judge recited that through the motion, AdLine sought a finding that Buckley was in contempt and "a mandatory order concerning the use of the right of way" (at para. 1). In the section entitled 'Positions of the Parties', the motion judge said that AdLine

sought “permanent injunctive relief” (at para. 9). The motion judge then applied the familiar three-part test for interlocutory injunctions set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (at para. 25).

[28] The motion judge concluded that she would grant AdLine’s request for “interim and interlocutory injunctive relief” (at para. 28). In her view, such relief was needed to protect AdLine’s property right – a right of way existing since 1957 – from interference.

[29] The motion judge recognized that Buckley also requires the use of the laneway for its business. In her view, this justified temporary blockages of the laneway for short periods of time.

[30] The motion judge then made an order with a series of detailed terms respecting the use of the laneway. The specific terms of the order can be found below in the section entitled “The Order under Appeal”.

[31] Finally, the motion judge declined to grant a mandatory order compelling Buckley to restore the clearance height of the laneway to its original dimensions. Instead, the motion judge gave Buckley four months to remedy the matter voluntarily, failing which AdLine could return to court to seek that aspect of injunctive relief.

The Second Endorsement

[32] Following the release of the First Endorsement, the parties disagreed on two of its provisions: whether written notice was required for deliveries outside of normal business hours, and the appropriate clearance height of the laneway.

[33] The motion judge heard oral submissions from the parties on these two disputed aspects of the order and, on May 31, 2013, she issued an endorsement in which she resolved them (the "Second Endorsement").

[34] In the Second Endorsement, the motion judge began by stating that in respect of AdLine's motion for "mandatory injunctive relief", she had been satisfied that the *RJR-Macdonald* test was met and thus she had ordered "interim and interlocutory injunctive relief". She then dealt with the two points of disagreement arising from the order contained in the First Endorsement.

[35] The motion judge explained that the 24 hours' written notice provision was intended to apply only to regular business hours. Outside of these hours, prior written notice was not required. However, the maximum total time that vehicles could deliver or receive goods, regardless of the day, was 120 minutes in any given day.

[36] The motion judge clarified that the clearance height of the laneway was 12.2 feet.

The Third Endorsement

[37] Following the release of the Second Endorsement, Buckley retained new counsel. The parties again disagreed on the order. Specifically, they disagreed on whether the injunctive relief that the motion judge had ordered was permanent or interlocutory.

[38] On July 3, 2013, the motion judge issued a third endorsement in which she addressed this disputed aspect of the order (the "Third Endorsement"). The Third Endorsement consists of four paragraphs.

[39] In the first paragraph, the motion judge again recites that AdLine had sought "mandatory injunctive relief" and that she had granted "interim and interlocutory injunctive relief".

[40] In the second paragraph, the motion judge gave a brief summary of the circumstances surrounding the making of the Second Endorsement.

[41] In the third paragraph, the motion judge explained that Buckley had retained new counsel and that the parties had again been unable to agree on the terms of the order. She stated that counsel had appeared before her that day and made submissions concerning the issue and that she had signed a form of the order that reflected her decision.

[42] The fourth paragraph contains the motion judge's reasons for concluding that she intended to order permanent injunctive relief. The full text of those reasons reads as follows:

> In the signed order, I clarify that the terms of injunctive relief ordered with the exception of the mandatory order to remedy the height clearance are imposed as permanent injunctive relief.

[43] The motion judge concluded the fourth paragraph by stating that the issue of the height clearance had not been finally determined and that the matter was adjourned, on terms, to enable the parties to rectify the situation.

THE ORDER UNDER APPEAL

[44] An order, dated May 31, 2013, was finally taken out in this proceeding (the "Order under Appeal").

[45] In the Order under Appeal, the motion for contempt is dismissed and, in paras. 2 and 3, injunctive relief is ordered. The following analysis is informed by the nature and extent of that relief. Thus, paras. 2 and 3 of the Order under Appeal are set out now.

> 2. THIS COURT ORDERS that [AdLine's] motion for a mandatory order concerning the use of the right of way described as Parts 3, 4, and 5 on Plan 65R-7394 ("Right of Way"), is hereby [granted] on the terms set out in paragraph 3 below.
>
> 3. THIS COURT ORDERS that [Buckley] shall provide [AdLine] with reasonable, unimpeded access through the Right of Way in accordance with the following terms:

(a) the [Appellants] and their agents and employees are prohibited from parking vehicles in the Right of Way;

(b) the [Appellants] are permitted to allow vehicles to stop in the Right of Way that are delivering to or receiving goods from the [Appellants'] premises during the hours of 9:00 a.m. to 5:00 p.m. Monday through Friday inclusive but such activity is limited to 30 minutes or less except with prior written notice of at least 24 hours to the [Respondents];

(c) outside of regular business hours… prior written notice by the [Appellants] is not required; however, the total amount of time that vehicles may deliver to or receive goods from the [Appellants'] premises, regardless of the day, is up to 120 minutes (two hours) on any given day;

(d) the [Respondents] shall notify the [Appellants] if they learn that a vehicle has been parked in the Right of Way in violation of this order and the [Appellants] shall take immediate steps to have the vehicle removed;

(e) if the [Appellants] do not take steps to have the vehicle which is improperly parked in the Right of Way removed within 20 minutes of being notified by the [Respondents] that access is being blocked, then the [Respondents] may arrange a towing service to remove the vehicles at the expense of the [Appellants] or the owner of the vehicle;

> (f) during [business hours], the employee doors and the shipping doors of the [Appellants] shall remain closed except when they are actively used; they may not be used for more than 30 minutes at a time and for a total of 120 minutes in any given day;
>
> (g) employees of the [Appellants] shall be directed to make way for delivery vehicles which require access through the Right of Way to the [Respondent's] premises. The [Appellants] are also required to direct their customers and others not to park in the Right of Way;
>
> (h) any future construction work to the Right of Way shall be done on notice of 24 hours to the [Respondents] and shall be carried out in a way to allow vehicle access to 255 Main Street during business hours of 9:00 a.m. to 5:00 p.m., Monday through Friday inclusive each week; and
>
> (i) there shall be no material change to the Right of Way that will restrict access to 255 Main Street by vans and vehicles as exists as of the date of this order unless there is agreement of both owners of 247 Main Street and 255 Main Street.

[46] It will be noted that the Order under Appeal does not expressly state that the injunctive relief is permanent. In fact, as can be readily seen, para. 2 of the Order under Appeal refers to AdLine's motion for a "mandatory" order, not a

permanent order. However, the Third Endorsement makes it clear that the motion judge intended to impose permanent injunctive relief.

THE ISSUES

[47] Buckley accepts that the motion judge had the power to grant interlocutory injunctive relief. The error, it contends, was in making the injunctive relief permanent. Specifically, Buckley submits that the motion judge erred by:

1. changing the order from an interlocutory injunction to a permanent injunction without explanation;
2. imposing a permanent injunction on the basis of the test for an interlocutory injunction;
3. making findings of fact not available on the motion; and,
4. ordering a permanent injunction despite the absence of an underlying legal proceeding.

[48] A lack of precision in the terminology associated with injunctive relief appears to have contributed to some confusion in these proceedings. Thus, the key terms will be clarified before I address the issues.

KEY TERMS RELATING TO INJUNCTIONS

[49] Various types of injunctive relief have been sought or ordered in this proceeding: interim, interlocutory, mandatory and permanent. What do each of those terms mean and how do they differ from one another?

[50] Let us first consider interim and interlocutory injunctions. While motions for pre-trial injunctive relief often term the relief that is sought as both interim and interlocutory, some distinctions can be drawn between the two.

[51] A motion for an interim injunction can be made *ex parte* or on notice. Argument on the motion is generally quite limited and, if an order is made for interim injunctive relief, the order is typically for a brief, specified period of time: see Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto: Canada Law Book, 2013), at para. 2.15. If an interim injunction is granted on an *ex parte* basis, the moving party must normally bring a further motion to have the interim injunction continued

[52] An interlocutory injunction, like an interim injunction, is a pre-trial form of relief. It is an order restraining the defendant for a limited period, such as until trial or other disposition of the action: see Sharpe, at para. 2.15. Interlocutory injunctive relief typically follows much more thorough argument than that for an interim injunction, by both parties, and is generally for a longer duration than an interim injunction.

[53] The present case provides an example of both an interim and an interlocutory injunction.

[54] The Interim Order is an example of an interim injunction. AdLine originally moved for interim injunctive relief on an *ex parte* basis. However, both parties were present when the motion for interim relief was argued. Justice Stinson opened his endorsement by emphasizing the very limited nature of the question before him: should interim injunctive relief be granted pending the scheduled hearing of the Contempt Motion? The injunctive relief granted in the Interim Order was specified to last for that period of slightly less than two months.

[55] The Consent Order, on the other hand, was the product of both parties' participation, and the duration of the injunctive relief restraining Buckley's use of the laneway, while not clear on the face of the Consent Order, appears to have been for the period of the laneway's renovation in 2009.

[56] The next useful distinction to be drawn is between interlocutory and permanent injunctions. Interlocutory injunctions are imposed in ongoing cases whereas permanent injunctions are granted after a final adjudication of rights: see Sharpe, at para. 1.40, citing *Liu v. Matrikon Inc.*, 2007 ABCA 310, 422 A.R. 165, at para. 26. As will be seen, this conceptual distinction features prominently in the present case, where a key issue is whether the court must apply a different test for permanent injunctions than for interlocutory injunctions.

[57] It is also important to distinguish between mandatory and permanent injunctions. A mandatory injunction is one that requires the defendant to act positively. It may require the defendant to take certain steps to repair the situation consistent with the plaintiff's rights, or it may require the defendant to carry out an unperformed duty to act in the future: see Sharpe, at para. 1.10. Mandatory injunctions are rarely ordered and must be contrasted with the usual type of injunctive relief, which prohibits certain specified acts.

[58] Because of their very nature, mandatory injunctions are often permanent. However, permanent injunctions are not necessarily mandatory. An example illustrates this point. If, after trial, a court orders that a defendant can never build on a right of way, it will have made a permanent order enjoining the defendant from building on the right of way. But, the injunction would not be mandatory because it does not require the defendant to perform a positive act.

[59] In short, the words "mandatory" and "permanent" are not synonymous, especially in the context of injunctive relief.

ANALYSIS

Issue 1 – Did the Motion Judge Change the Order Without Explanation?

[60] The first issue arises because in the Third Endorsement, the motion judge altered the order that she had made in the First Endorsement, and granted permanent, rather than interlocutory, injunctive relief.

[61] Buckley says that ordering permanent injunctive relief was not a clarification, as the motion judge said, but a change. Buckley concedes that the motion judge had the authority to change the order because it had not yet been formally filed with the court. However, Buckley submits, reasons must be given for such a change and, in this case, the motion judge failed in that regard.

[62] AdLine submits that the motion judge did not change her order; rather, she simply clarified it. AdLine says that the motion judge's references to interlocutory injunctions in the First and Second Endorsements were inadvertent and that the motion judge had always intended to grant permanent injunctive relief. Consequently, AdLine maintains, the motion judge sufficiently explained the change in her order by stating that it was a clarification.

[63] I would accept Buckley's submission on this issue.

[64] As Buckley conceded, until the order was formally entered, the motion judge had a broad discretion to change it: see *Montague v. Bank of Nova Scotia* (2004), 69 O.R. (3d) 87 (C.A.), at para. 34. However, a judge exercising that discretion bears a "significant onus" to explain the change: *Montague*, at para. 40.

[65] The first question, therefore, is whether making the order for injunctive relief permanent rather than interlocutory was a change. In my view, there can be no doubt that it was.

[66] The First Endorsement contains the motion judge's reasons for granting relief. In it, the motion judge sets out and applies the *RJR-MacDonald* test, which she identifies as the test for an interlocutory injunction. The motion judge makes no mention of the test for permanent injunctions nor did she consider whether that test had been met.

[67] Having found that the test for an interlocutory injunction had been met, the motion judge then expressly granted relief in those terms, saying at para. 28 of the First Endorsement, "The request for interim and interlocutory relief is granted with reference to the right of way, legally described as…."

[68] The sole reference to permanent relief in the First Endorsement is in para. 9, where the motion judge sets out AdLine's position and says it sought "permanent injunctive relief". However, according to the record, AdLine did not seek permanent injunctive relief. The word "permanent" does not appear in its notice of motion for the Contempt Motion. While AdLine repeatedly asked for mandatory injunctive relief in its notice of motion, as we have seen, the words mandatory and permanent have very different meanings in respect of injunctions.

[69] Furthermore, in the first paragraph of each of the Second and Third Endorsements, the motion judge repeated that she was satisfied that the *RJR-MacDonald* test had been met and thus she had granted "interim and interlocutory relief" in respect of the right of way.

[70] Having found that the motion judge made a change to the order, we must consider whether she explained the change. In my view, she did not.

[71] As I have explained, the sole reason given for the change is that it was a clarification. Having made an order that the injunctive relief was interlocutory, when the motion judge declared it to be permanent, she was not clarifying the order, she was changing it. Thus, saying it was a clarification does not amount to a reason for changing the order.

[72] As *Montague* points out, the onus to explain any change to an order is significant. The seriousness of the change in this case underscores that onus. If the Order under Appeal stands, Buckley and anyone who might later take title from Buckley will be permanently, seriously restricted in the use of its own laneway. A consideration of just one component of the Order under Appeal makes this clear: Buckley – and any subsequent owner – would have to ensure that the cumulative time in which delivery vehicles are on the laneway never exceeded 120 minutes in a day. This prohibition would extend to every day of the week, no matter the circumstances, and would remain so long as the right of way exists, even if AdLine were no longer operating from its premises. It is one thing for Buckley to face an order restricting its use for a limited period. It is quite another to contemplate such restrictions on a permanent basis, including if and when Buckley wished to sell its property.

[73] A clear explanation for the change to the order was required so that the parties, and this court on review, could know the reason for the change. It was an error to fail to give that explanation.

Issue 2 – Is the Test for a Permanent Injunction Different than the Test for an Interlocutory Injunction?

[74] The test for interlocutory injunctions is the familiar three-part inquiry set out in *RJR-MacDonald*: is there a serious issue to be tried; would the moving party otherwise suffer irreparable harm; and, does the balance of convenience favour granting the injunction.

[75] Does that same test apply when the court is deciding whether to grant permanent injunctive relief? AdLine contends that it does and points to cases such as *Hanisch v. McKean*, 2013 ONSC 2727, at para. 111, and *Poersch v. Aetna*, 2000 CanLII 22613 (Ont. S.C.), at para. 103, where the courts have expressly applied the test when deciding whether to grant permanent injunctive relief.

[76] I would not accept this submission. In my view, a different test must apply.

[77] The British Columbia Court of Appeal recently considered the test for a permanent injunction and its relationship to the test for an interlocutory injunction. In the decision under review in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680, the trial judge granted permanent injunctive relief based on the test for an interlocutory

injunction. Despite the parties' agreement that the trial judge correctly set out the test, the British Columbia Court of Appeal held that the wrong test had been applied and reversed the trial decision.

[78] Justice Groberman, writing for the court, explained that the *RJR-Macdonald* test is for interlocutory – not final or permanent – injunctions. At para. 24 of *Cambie Surgeries*, he explained that the *RJR-Macdonald* test is designed to address situations in which the court does not have the ability to finally determine the merits of the case but, nonetheless, must decide whether interim relief is necessary to protect the applicant's interests.

[79] In paras. 27-28 of *Cambie Surgeries*, Groberman J.A. explained:

> Neither the usual nor the modified test discussed in *RJR-MacDonald* has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.
>
> In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in

> evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

[80] I would adopt this reasoning. The *RJR-Macdonald* test is designed for interlocutory injunctive relief. Permanent relief can be granted only after a final adjudication. Different considerations operate and, therefore, a different test must be applied, pre- and post-trial.

Issue 3 – Did the Motion Judge err by making Findings of Fact not available on the Motion?

[81] In this case, there was no dispute that AdLine had a right of way over the laneway. The questions for the motion judge were whether Buckley was infringing AdLine's rights in the laneway and, if so, what type of interlocutory injunctive relief was appropriate.

[82] To decide these questions, the motion judge had to weigh the competing evidence and make factual findings about the extent, if any, of Buckley's interference with AdLine's right of way.

[83] It will be recalled that AdLine and Buckley offered dramatically competing versions of events. One version or the other had to be preferred in order to decide whether Buckley had infringed AdLine's rights. In this regard, I note that the motion judge's reasons do not refer to Buckley's contrary evidence and there is no indication why the motion judge accepted AdLine's evidence and (implicitly) rejected that given by Buckley.

[84] Given the nature of the conflicting evidence in this case, credibility would play a large role in making the necessary factual findings. In my view, it is hard to conceive of how such credibility findings could be made without a trial.

[85] There is a second reason why the factual findings in this case were not available, namely, the nature of the relief ordered.

[86] In general terms, injunctive relief is onerous. It is available only when truly necessary to ensure that a party is not deprived of his or her rights. Even when injunctive relief is appropriate, the particulars of that relief must be determined so as to ensure a proper balancing of the parties' respective interests. That also demands a careful weighing of the evidence.

[87] The detailed restrictions imposed by the Order under Appeal demonstrate this point. Under that order, not only is Buckley prohibited from using the laneway except under strictly supervised times and manners, it has been placed under a positive obligation to monitor third-party use of the laneway and has been made responsible for the costs of removing third-party vehicles parked on the laneway.

[88] The motion judge gave no reasons for why she selected the particular terms of injunctive relief that she did. There is no evidence in the record to indicate why the terms in the Order under Appeal were selected nor how the motion judge determined that they constituted a fair and reasonable balancing of

the parties' respective rights and interests in the laneway. Again, given the nature and extent of the conflicting evidence, it is hard to conceive of how such relief could be fashioned without a trial.

[89] It is for these reasons that I accept that in this case, the findings of fact that were made were not available on the motion.

Issue 4 – Did the Motion Judge err in Ordering a Permanent Injunction in the Absence of an Underlying Legal Proceeding?

[90] Buckley submits that the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 do not contemplate free-standing motions "unmoored" from a legal proceeding, extant or contemplated. It points to Rule 1.03(1), in which "motion" is defined to mean a motion in a proceeding or an intended proceeding. Because the Application had been explicitly dismissed by the Consent Order, and no effort had been made to revive it, amend it, or commence a new proceeding, Buckley says there was no proceeding within which to bring the motion for permanent injunctive relief.

[91] Further, Buckley argues, to the extent that Rule 60.11(1) presupposes the existence of a proceeding when a party makes a motion for a contempt order, the motion judge exceeded the scope of the powers conferred by Rule 60.11(5) to make "such order as is just" when she purported to grant AdLine a permanent injunction.

[92] I agree that the motion judge did not have the jurisdiction to grant permanent injunctive relief, but for somewhat different reasons.

[93] In the Contempt Motion, AdLine sought two types of relief: a finding of contempt and further injunctive relief. Thus, Rule 60.11 was in play.

[94] Rule 60.11(1) stipulates that a motion for contempt is to be brought in the proceeding in which the order to be enforced was made. It reads as follows:

> 60.11(1) Motion for contempt order — **A contempt order to enforce an order** requiring a person to do an act, other than the payment of money, or to abstain from doing an act, **may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made**. [Emphasis added.]

[95] The Contempt Motion was to enforce the Consent Order. The Consent Order was made in the Application. Thus, pursuant to Rule 60.11(1), AdLine properly brought the Contempt Motion in the Application proceeding, even though the Application had been dismissed.

[96] Rule 60.11(5) allows a judge hearing a motion under Rule 60.11(1) to make orders short of a finding of contempt. The language of the rule is broad and contemplates any order that is "just": see *L.(S.) v. B.(N.)* (2005), 252 D.L.R. (4th) 508 (Ont. C.A.), at para. 22 .

[97] The relevant part of Rule. 60.11 (5) reads as follows:

> (5) Content of order — In disposing of a motion under subrule (1) **the judge may make such order as is just,** and where a finding of

> contempt is made, the judge may order that the person in contempt … [Emphasis added.]

[98] Accordingly, although the motion judge declined to find Buckley in contempt of the Consent Order, she retained the authority to make any order that was "just".

[99] The question then becomes: did the scope of the motion judge's powers under Rule 60.11(5) encompass the right to make an order for permanent injunctive relief? In my view, it did not.

[100] Rule 60.11(5) gives the judge the power to make such orders as are just when "disposing of a motion under subrule (1)". In this case, the motion was brought within the Application proceeding because the Consent Order had been made in that proceeding, and it was the Consent Order which AdLine sought to have enforced. But, AdLine could not rely on either the Consent Order or the Application for that part of its motion in which it sought further injunctive relief. On the findings of the motion judge, the Consent Order was spent because it related to the 2009 renovation. And, the Application had been dismissed. Consequently, there was no extant legal proceeding in which permanent injunctive relief had been sought. Put another way, once the motion judge found that the Consent Order was spent, that part of the Contempt Motion in which AdLine sought further injunctive relief was unmoored from a legal proceeding.

[101] The requirement that a motion be brought within a legal proceeding is a matter of substance, not form. A proceeding creates the framework within which the issues are defined and sufficient evidence is adduced such that the court can make a proper adjudication. The absence of such a framework in this case demonstrates precisely why a proceeding is necessary as the foundation for a motion. Because there was no proceeding, the evidence necessary to decide whether to grant permanent injunctive relief and, if so, the terms of that relief, was not before the court.

[102] Accordingly, it was an error to order permanent injunctive relief in the absence of an underlying proceeding.

DISPOSITION

[103] For these reasons, I would allow the appeal and set aside paras. 2 and 3 of the Order under Appeal.

[104] I would order costs of the appeal in favour of Buckley, fixed in the amount of $15,000, all-inclusive. The parties agreed that if this were the result on appeal, the costs order in para. 7 of the Order under Appeal should be set aside and costs of the Contempt Motion should be in the cause. I would so order.

Released: February 18, 2014 ("J.C.M.")

"E.E. Gillese J.A."
"I agree. J.C. MacPherson J.A."
"I agree. C.W. Hourigan J.A."

TAB 19

Case No: QBENI 1998/1407/A2

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(MR JUSTICE POOLE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 20 December 1999

B e f o r e :

THE MASTER OF THE ROLLS
LORD JUSTICE MORRITT
and
LORD JUSTICE WALLER

- - - - - - - - - - - - - - - - - - - -

BROADMOOR HOSPITAL AUTHORITY & ANR — Appellant

- v-

R — Respondent

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD
Tel No: 0171 421 4040, Fax No: 0171 831 8838
Official Shorthand Writers to the Court)

- -

MR EDWARD FITZGERALD QC and MR MARK WARWICK (instructed by Messrs Reid Minty, London W1X for the appellants)
MR RICHARD GORDON QC and MR PAUL BOWEN (instructed by Messrs Gowans, Paignton, Devon TQ4 5BT for the respondent)

- -

Judgment

Tuesday, 20 December 1999

JUDGMENT

LORD WOOLF MR :

1. This case raises an issue of general importance. The issue is whether a statutory body is entitled to be granted an injunction in civil proceedings to support its performance of its statutory duties.

2. The claimants are Broadmoor Hospital Authority (the "Authority") and Dr. Vermeulen. Broadmoor is a special hospital provided by the Secretary of State for the Department of Health pursuant to S.4 of The National Health Service Act 1977 as amended. Special Hospitals are provided for the detention of persons who in the opinion of the Secretary of State "require treatment under conditions of special security on account of their dangerous, violent or criminal propensities". The Authority is responsible for the management and the provision of treatment at Broadmoor. Dr Vermeulen is the Responsible Medical Officer ("RMO") who has responsibility for treating the defendant.

3. The defendant is a patient suffering from paranoid schizophrenia. He is detained at Broadmoor as a result of his conviction for manslaughter of an occupational therapist in September 1991. At the time of his offence, the defendant was undergoing treatment for his mental illness. At the time of his offence, apparently, he had intended to kill a psychiatrist.

4. By May 1998, the defendant had written a book entitled "Armageddon Ahoy". The defendant at his own expense had made arrangements for the Book to be printed and published. On realising this, the Authority issued proceedings. Subsequently, Dr Vermeulen was added as a party. The Authority's legal advisers communicated with the Attorney General's office as to whether the Attorney General would be prepared to bring proceedings in his capacity as guardian of the public interest. The Attorney General was not prepared to do so.

5. In the amended statement of claim the claimants seek an injunction that that the defendant be restrained:

(a) from publishing or seeking to publish the Book entitled "Armageddon Ahoy" or any parts thereof.

(d) from posting to anyone save those persons identified in section 134(3) of the Mental Health Act 1983 (the "Act") the Book entitled "Armageddon Ahoy" or any part of the said Book.

6. The claimants also by an amendment pursuant to leave granted by this court at a directions hearing on 29 April 1999 seek declarations that :

(a) the first and/or second plaintiffs entitled to instruct the defendant not to keep in his possession and/or not to publish or seek to publish the Book.

(b) it would be unlawful for the defendant to publish the Book in its present form.

(c) the first and second (plaintiffs) are entitled to seize the Book or any parts thereof.

7. The claim for the declarations are not in issue on this appeal. Mr Richard Gordon QC, who appears on behalf of the defendant, accepted in argument that the jurisdiction of the court to grant the declarations which are now claimed may be wider than the jurisdiction to grant the injunctions.

8. On 1 May 1998 Mr Justice Colman made an ex parte order granting the injunctions. The defendant's agent delivered up the copies of the Book. That order in relation to the first injunction was then continued by Mr Justice Penry-Davis on 18 May 1998. On 12 October 1998 after hearing argument on behalf of the parties, Mr Justice Poole discharged the orders made by Mr Justice Colman and Mr Justice Penry-Davis. Mr Justice Poole also ordered that so much of paragraph 7 in the Statement of Claim as alleges (either expressly or by implication) that the plaintiff has power :

(a) to prevent the defendant keeping in his possession, custody or power any copies of the Book that are neither :

(i) within the confines of Broadmoor, or

(ii) in the course of transmission by post and/or

(b) to prevent the defendant from publishing the Book

be amended or struck out as disclosing no reasonable cause of action.

9. Mr Justice Poole also ordered that "all copies of the Book delivered by the defendant (whether personally or by his agent) from outside Broadmoor Hospital and received by the plaintiff" as a result of Mr Justice Colman's injunction should be delivered up to the defendants' solicitors within 7 days. Pending the hearing of this appeal, the order of Mr Justice Poole has been stayed.

The Statement of Claim

10. As the judge struck out part of the Statement of Claim its terms are relevant. The Statement of Claim recites the fact that Broadmoor at the relevant times only admitted patients "who would present a grave danger to the public" and that Sections 3 and 37 of the Act provide for the involuntary admission of patients and their detention in hospital for medical treatment. It also sets out that Section 63 confers an express power on the RMO to provide medical treatment without the patient's consent.

11. The Statement of Claim alleges that the hospital had the power and (by amendment) the right to control and discipline patients in Broadmoor including the defendant and to take all necessary steps to secure a safe and therapeutic environment for patients detained at Broadmoor. By amendment it also alleges that Dr Vermeulen, as the defendant's RMO, had the right and power to instruct the defendant to surrender or hand over any offensive or potentially harmful book in his possession that would damage or interfere with his effective treatment. It is also alleged that Dr Vermeulen had the power and the right to instruct the defendant not to publish a book or to court publicity in a way that would damage his treatment. Reliance is also placed on Section 134 of the Act which gives the authority to withhold from the post office a postal package addressed "to any person by a patient detained" if in the opinion of the managers of the hospital they consider the package is likely to cause distress to the person to whom it is addressed or to any other person (not being a person on the staff of the hospital) or cause danger to any person or staff.

12. An allegation is also made that by necessary implication Broadmoor has a general duty to ensure that patients do not transmit to the outside world materials or documents that are likely to cause distress to the person to whom they are addressed or to cause danger to any person. Reliance is also placed on a duty which those working in Broadmoor but to patients to preserve the confidentiality of details concerning the patients mental condition, their history, their treatment and their progress in Broadmoor. It is also alleged that the defendant owes a similar duty to his fellow detainees.

13. Paragraph 7 (now paragraph 9.1) of the Statement of Claim, referred to in Mr Justice Poole's judgment, in its amended form states that not only have the claimants the power to do the matters referred to in the judge's order, but they now have the duty and/or right to do those things and the claimants are entitled to instruct the defendant to deliver up the Book or material which relates to the Book.

14. The Amended Statement of Claim also refers to the publication by the defendant of an earlier book about his life and the fact that the publication caused a deterioration in the defendant's mental state and distress to the family of the occupational therapist who the defendant killed. The likely effect of the publication of the Book particularly if this attracted the attention of the media is amplified in the witness statements and affidavits prepared by Dr Vermuelen.

Dr Vermuelen's Evidence

15. In his evidence Dr Vermuelen refers to the contents of the Book which the court has had the opportunity to read. As he explains, the Book describes how the defendant killed his victim and sets out his justification for doing so. That description includes the fact that the defendant states that he had "behaved without malice and with the highest motives" and that he knew he was moral. A feature of the Book is that the defendant explains that he wanted publicity for himself and that the crime was committed to "make me newsworthy". The Book describes how he enquired of the police whether his killing had been reported. He "wanted to know whether the media had yet picked upon my case". Dr Vermuelen states that the defendant had no prior knowledge or encounter with his victim and in his, the doctor's opinion, the publication of the Book would cause distress to the victim's family.

16. Dr Vermuelen also points out that the Book contains references to thirteen other Broadmoor patients. And that if any of those patients had the opportunity to read the Book they would recognise themselves from its contents. The Book sets out details of his fellow patients history and offences including in at least one case what the doctor had written about that patient. Some of the details are said to be intimate or embarrassing and there are references to two suicide attempts on the part of fellow patients. He says that if the contents of the Book were to come to the patients attention they would be deeply disturbed. There is also a suggestion made that the patients could attack the defendant as a result of the publication.

The Judgment

17. The argument which was advanced before Mr Justice Poole was more restrictive than the argument which has been advanced before this court. In addition the Statement of Claim had not then been amended. However, in regard to that argument and on the pleadings in their then state, Mr Justice Poole concluded that the injunction had to be discharged because it depended upon the assertion of a power that the authority did not possess and was inconsistent with the structure of the Act.

18. Mr Gordon's principle argument in support of Mr Justice Poole's decision is that the court had no power to grant the injunctions. However he also submits that, in any event, they should not have been granted as a matter of discretion. The arguments raised on the appeal can therefore be conveniently divided under two heads. First of all the jurisdiction or the power of the court to grant the injunctions (the Jurisdiction Issue) and secondly, assuming the court has the power to grant the injunction, whether it was appropriate to grant the injunction on the facts of this case (the Discretion Issue).

The Jurisdiction Issue

19. Mr Gordon divides his submissions as to why the court lacks jurisdiction to grant the injunctions under a number of heads. They can however be conveniently regarded as addressing the lack of standing of the claimants and the absence of any involvement of a right of the claimants. The considerations which they raise overlap so I will deal with them together.

20. Usually, and probably invariably, if a person is entitled to be granted an injunction he will have the necessary standing to claim an injunction. Thus a party to a contract who is entitled to rely on a contract has sufficient standing to bring an action based on his rights under the contract, to seek an injunction. The situation is the same in tort. It is also true in relation to equitable rights. If you have an equitable right an injunction is available in support of that equitable right Thus in the *Siskina* [1979] A.C. 210, Lord Diplock pronounced his well known dicta that an injunction is available "in protection or assertion of some legal or equitable right which the High Court has jurisdiction to enforce by final judgment". (At p.356E-F) That valuable dicta has, however, to be applied with a degree of caution. It is far from being an exhaustive statement of the extent of the court's powers to grant an injunction or as a guide as to who is entitled to bring proceedings to claim an injunction. The correct position is succinctly summarised in *Spry, The Principles of Equitable Remedies* 5th Ed. (1997) at p.32 in the following terms :

21. The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves , not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.

22. I recognise that the editor of *Spry* in the passage from which I have quoted cites in a footnote two statements, one of Lord Goff in *South Carolina Insurance Co v Assurantie Maatschappij* [1987] A.C. 24 at p.44-45 and the other Lord Nicholls *in Mercedes Benz A.G. v Leiduck* [1996] A.C. 283 at p.308 which are contained in minority speeches in the House of Lords on this subject. However, Lord Brandon in the South Carolina case in giving the opinion with which Lord Bridge and Lord Brightman agreed identified a further category of situation from that identified by Lord Diplock namely "where one party to an action has behaved or threatens to behave in a manner which is unconscionable" and in addition referred to two exceptional situations which also do not fall within Lord Diplock's classification, namely the grant of an injunction to

restrain proceedings in a foreign court and the grounds for the grant of a Mareva or freezing injunction.

23. Lord Goff's reluctance in the South Carolina case "to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories" and Lord Nicholls' statement in the Mercedes Benz case that there are "highly persuasive voices that the jurisdiction to grant an injunction, should not be rigidly confined to exclusive categories by judicial decision" have been echoed in New Zealand by Cooke P (as he then was) in *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 2 NZLR 435 when he stated "the remedy of injunction should be available whenever required by justice" (at p.438). This is an approach which I would respectfully endorse.

24. Lord Diplock in the *Siskina* case and Lord Brandon in the *South Carolina* case were not, for example, dealing with applications for judicial review. This approach was not exhaustive. From 1977, an injunction has been available as an alternative remedy to the prerogative writs on an application for judicial review and on an application for judicial review there is a different test to establish standing, namely that of "sufficient interest in the matter to which the application relates". (Order 53r.3(7) and Section 31 of the Supreme Court Act 1981). This test does not depend on rights. "Sufficient interest" has been approached by the courts in a generous manner so that almost invariably if an applicant can establish a case which deserves to succeed, standing will not constitute a bar to the grant of a remedy. This is a sensible and an appropriate approach since the purpose of rules as to standing are to protect the courts from being troubled by litigants who have no interest in the litigation and are mere busy bodies. They are not designed to prevent litigants who have a meritorious claim from pursing that claim.

25. The broad approach on an application for judicial review is in accord with the approach of Lord Goff and Lord Nicholls but it must be recognised that it does not yet reflect the position in ordinary private law proceedings in the courts. In particular without the assistance of the Attorney General, Mr Gordon is right to submit that in general a member of the public is unable to bring private law proceedings and obtain an injunction to uphold public rights or to enforce public duties or to enforce the criminal law. (See *Gouriet v Union of Post Office Workers* [1978] A.C. 435). He submits here we are in the area, if any right is involved, of public law rights. Again, however, it must be recognised that the general rule states how the jurisdiction of the court will be exercised in practice rather than defining that jurisdiction which is statutorily codified by Section 37 of the Supreme Court Act 1981. There can therefore be situations where in private law proceedings there are situations where the courts will recognise the ability of an individual to obtain injunctive relief

even though the courts will be intervening to protect a public duty. Thus, in the *Chief Constable of Kent v V* [1983] 1 QB 34 this court recognised the standing of the Chief Constable to obtain an injunction to prevent the dissipation of assets which the police had a public law duty to preserve pending the resolution of a criminal trial. Differing reasons were given by the members of the court for this conclusion and the approach of Lord Denning MR has been doubted in subsequent cases including the *Chief Constable of Hampshire v A Limited* [1985] QB 132. Nonetheless, the correctness of the result in that case has not been doubted. The justification for the decision in my view is the fact that the Chief Constable has a special responsibility for the enforcement of the criminal law.

26. In the *Chief Constable of Kent* case, the Chief Constable was not in a position to rely on any statute. A statute can expressly authorise a public body to bring proceedings for an injunction to support the criminal law. This is the position under the Local Government Act 1972 (section 222). In relation to many statutory functions the power to bring proceedings can be implicit. The statutes only rarely provide expressly that a particular public body may institute proceedings in protection of specific public interests. It is usually a matter of implication. If a public body is given responsibility for performing public functions in a particular area of activity, then usually it will be implicit that it is entitled to bring proceedings seeking the assistance of the courts in protecting its special interests in the performance of those functions. The position is analogous to that which exists where a member of the public suffers special damage in consequence of a public wrong. Mr Gordon submits this wider jurisdiction is confined to the grant of a declaration and it is correct that most of the examples where a statutory body has been granted relief are cases where what was being sought was a declaration. However, once it is recognised, that the public body has standing, then I can see no reason why the remedy available to the public body should be confined to a declaration and not extend also to an injunction. Of course, the court may be more prepared to grant a declaration than an injunction as a matter of discretion but the decision will then not turn on a lack of standing or an absence of jurisdiction. I would therefore summarise the position by stating that if a public body is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the courts should grant such an application when "it appears to the court to be just and convenient to do so".

27. In his submissions Mr Gordon not only challenges the existence of any such approach as I have identified but also submitted that what was involved here was not the authority's rights or duties but powers. I do not accept Mr Gordon's approach. The legislation which deals with the

running of the special hospitals and the treatment of patients detained there makes it clear that the authority has duties. It has duties to treat the patients; it has duties to maintain the security of the hospital and it has a duty to provide a therapeutic environment. As a consequence of its duties it can be said to have certain implicit statutory rights. It has for example the right to search patients or for that matter visitors. Mr Gordon would describe this not as a right but a power. It can appropriately be so described but once the authority has in its discretion determined that it should exercise the power, it becomes under a duty to exercise the power and has the right to do so. The power, the duty and the right are public law and not private law rights but in my judgment this does not affect the ability of the authority to seek an injunction or the jurisdiction of the court to grant an injunction. (See *R v Broadmoor General Hospital Authority ex parte S H & D* 5th February 1998 and *R v Broadmoor Special Hospital Authority ex parte SHDL* 15 October 1997 at p.27 et seq and *Poutney v Griffiths* [1976] A.C. 314 especially at p.335).

28. Mr Gordon accepts that the Authority has responsibilities on these lines but he would submit that in addition to being only powers they are confined to what happens within the confines of the hospital and does not extend outside the perimeters of the hospital in the absence of express statutory authority. Furthermore he submits that as the authority is well able to rely on its general powers such as its powers to search the inmates, no intervention by the courts by way of injunction is required.

29. It is important to note that the grant of the injunction need not be to enforce the statutory power directly. So here there is no express power to seize books outside the hospital. However, if it can be shown an activity is taking place outside the hospital the court may, if appropriate, grant an injunction to restrain that activity if it is an activity which can be shown to be having a sufficiently significant impact on the security of the hospital or the treatment of a patient. There would need to be circumstances warranting the interference with a third party. Here this creates no difficulty because the third party, the printer, is only involved as the patient's agent. If however there were to be someone who was not a patient who was indulging in conduct, for example writing letters to patients which was interfering with security or treatment in the hospital there would be jurisdiction to grant an injunction.

30. Mr Gordon also submits that Section 134 of the Mental Health Act is inconsistent with the court being able to grant an injunction. Section 134 confers on the authority a specific power to seize postal packets to prevent the dissemination of material by detained patients that are likely to cause distress to the person to whom it is addressed or to any person or to cause danger to any

person. Mr Fitzgerald relies on this power and submits that the court could where appropriate uphold this power by the grant of an injunction. Mr Gordon disputes this and contends that to grant an injunction on this basis would bypass the prisoner's express statutory right to a review of the exercise of this power under Section 121 of the Act. The power contained in Section 134 of the Mental Health Act, is partly explained by the fact that in the absence of this power, to interfere with a postal package can be an offence under Section 56 of the Post Office Act 1953. Furthermore, while it is correct that the grant of an injunction could bypass the statutory right of review, this point has reduced significance because the court before granting an injunction would be required to be satisfied that the intrusion into the patient's interest which the injunction would involve was justified. Again I regard the existence of the power under Section 134 as being relevant to discretion and not jurisdiction.

31. There are submissions of Mr Gordon which I would accept. First I would accept that the authority cannot bring proceedings to protect any patients' right to privacy or confidence. To protect other patients, the authority have to rely on the interference which the conduct of which complaint is made would have on the performance of their duties. In particular, duty of the Authority to maintain security, order and a therapeutic environment within the hospital. The position is the same with regard to the family of the defendant's victim. Naturally, the court would wish to protect them from being caused further distress. But regrettably I do not consider that the courts here can help in proceedings brought by the Authority. The powers and responsibility of the Authority do not extend to providing the protection the family would like unless the conduct complained of affects the Authority's responsibilities within the hospital.

32. As far as jurisdiction is concerned therefore, I regard the court as being able on the application of the authority to grant an injunction if the grant of that injunction is justified in order to enable the authority to perform its statutory responsibilities. It must however be recognised that primarily these responsibilities relate to what happens within the hospital. Conduct outside the hospital can affect what happens within the hospital and if this is so <u>jurisdiction</u> exists in the court to provide protection by injunction.

<u>Discretion</u>

33. I therefore turn to whether it is right for either of the injunctions which were claimed to be granted. Poole J on the more restricted argument before him, came to the conclusion that the injunction should not be granted because they depended upon the assertion of power which the plaintiff did not possess and because of the structure of the Mental Health Act 1983. As to the

structure of the Act and the powers of the plaintiff, I take a different view from the judge in so far as what happens outside the hospital affects what happens within. I do however consider that his decision was right as a matter of discretion. My reasons are as follows :

(i) To grant an injunction against a patient who is detained, without limitation of time, which is the defendant's position, is an exercise of jurisdiction which will rarely be appropriate. Mr Gordon is right that generally the authority's own internal powers will be sufficient and will not require the backing of the court. In addition there are problems where there is no practical step which the courts can take to enforce the injunction because the patient is already compulsorily detained. This underlines the unsuitability of granting an injunction.

(ii) No doubt the object of obtaining an injunction was to bind the printers and publishers as the defendant's agent. The injunction would have been capable of being enforced against them and as a matter of principle I would not regard this as an impermissible objective if otherwise the Authority's powers would be adversely affected. The fact that the printers and publishers are independent third parties means however that caution should be exercised before an injunction is granted with the intention that it should only in practice bite on a third party. Furthermore, the court would need to be satisfied it is required for example to maintain security or to treat the patient.

(iii) It follows that the fact that the injunction is designed to operate outside the confines of Broadmoor is not in principle a reason why an injunction should not be granted. If for example an individual was causing interference with the discipline of a special hospital by writing letters to the patients then notwithstanding the ability of the authority to censor correspondence, in the appropriate situation an injunction against the individual could be granted to reduce the risk of discipline being undermined and treatment interfered with. However there would need to be a substantial risk of the Authority's powers being prejudiced and I am not satisfied there is such a risk here.

(iv) The concern of the Authority here is less with the publication of the Book than the publicity in the media which could occur as a result of the Book being published. Mr Gordon properly draws attention to the importance which the common law and Article 10 of the European Convention of Human Rights attaches to freedom of speech. The freedom is not unqualified but this remains an important consideration.

(v) Injunctions should not be granted if they are unlikely to be effective. I have grave reservations as to whether it could be possible prevent publication in the media now that the Book has been printed and has been in limited circulation. The grant of the injunction which the plaintiff's seek would be likely to have to be followed up by further actions in the court. An illustration of what can happen has already been provided by the application which the Authority made to restrain publication of these proceedings. I understand the desire of the Authority to protect the defendant and his fellow patients, but I am far from satisfied that this can be in fact achieved by the grant of the injunctions which are sought.

34. On balance I have therefore come to the conclusion that the injunctive relief which is sought is not a remedy which should be granted.

35. Although therefore I would dismiss the appeal, I would emphasise that it is my earnest hope that the media will feel it appropriate to exercise self-restraint in relation to the publicity they give to these proceedings and to the Book. Although the court is not in a position to protect the family of the defendant's victim, I would hope that this is a matter to which the media will give appropriate weight. I would also hope that the media will fully take into account the fact that if they do give extensive coverage to the defendant's Book, they will be fulfilling the purpose for which the defendant committed his horrendous crime.

36. We have not had an opportunity of hearing an argument as to what consequential orders are appropriate in the light of our decision on this appeal and while I would dismiss the appeal I would be prepared to hear submissions as to consequential relief.

LORD JUSTICE MORRITT :

37. The circumstances in which this appeal arises have been fully described by the Master of the Rolls. I gratefully adopt his account of them. The question is whether the court has jurisdiction to grant to the Broadmoor Hospital Authority ("Broadmoor") an injunction requiring the defendant ("R") to deliver up to them the manuscript of the book he has written so as to prevent its publication. It is common ground that the manuscript was not, when such an injunction was originally granted by Colman J on 1st May 1998, physically within the confines of Broadmoor. It was held by a publisher but as agent for R. It is also common ground that R is not incapable, by reason of any mental disorder or otherwise, of managing and administering his own property and

affairs. Accordingly the Court of Protection has no jurisdiction over him or his property. s.94(2) Mental Health Act 1983.

38. The factual justification for preventing publication advanced in the evidence is fourfold, namely (1) the distress to the relatives of R's victim; (2) the serious risk to R of violent assault by those of his fellow patients he has identified in the book; (3) the detrimental effect on the mental health of R of discovering, following publication, that his claim to be "innocent" and blameless is not accepted by others, described in the affidavit of the Responsible Medical Officer as "certainly not conducive to his treatment" and (4) the disturbance to and interference with the treatment of the other patients details of whose offence, disorders or treatment are disclosed in the book.

39. It is not suggested that any of these concerns is not real. In particular I share the first. It is therefore with the greatest regret that I conclude that it cannot be any justification for the implication or exercise of the requisite power as it would have nothing to do with the performance of the functions or duties of Broadmoor. The second and fourth factors could not justify the width of the injunction sought because there are only about 13 pages out of 150 in which material relevant to other patients in Broadmoor is contained. Thus the claim must be tested by reference to the powers and duties of Broadmoor relating to the treatment of R.

40. Of the three grounds originally advanced in justification of the injunction the only one now pursued is an implied statutory right or power to require a patient undergoing treatment not to publish a book written by him and, if required, to deliver up to Broadmoor the manuscript and any copies of it under the patient's control even if situate outside Broadmoor. The implication is said to arise from the duties and functions of Broadmoor as a special hospital provided by the Secretary of State for Health pursuant to s.4 National Health Service Act 1977 for persons subject to detention under Mental Health Act 1983 who require treatment under conditions of special security on account of their dangerous, violent or criminal propensities. It is the function of Broadmoor to provide such treatment and a safe therapeutic environment within which to do so. *R v Broadmoor Special Hospital Authority, ex parte S, H and D* (Court of Appeal 5th February 1998 unreported).

41. In the performance of those functions Broadmoor has both express and implied powers. The express powers include a power, s.63, to carry out most forms of treatment under the direction of the responsible medical officer but without the consent of the patient and a power, s.134, to intercept incoming or outgoing mail. But, as Auld LJ observed in *R v Broadmoor Special Hospital Authority, ex parte S, H and D* (CA Transcript p.14), the relevant legislation leaves unspoken many

of the necessary incidents of control flowing from a power of detention for treatment. Those powers are to be found by implication. But, as this court held in that case, the test for the implication of such powers is that of necessity. (CA Transcript per Auld LJ at pp.15-17 and per Judge LJ at p.25).

42. The injunction sought would interfere with the exercise by R of his civic right of free speech and his proprietary right as the owner of the copyright in the book. As such the test for the implication of the necessary power is the stringent one to which Steyn LJ referred in *R v Home Secretary, ex parte Leech* [1994] QB 198 at p. 212E, namely whether "there is a self-evident and pressing need" for the power in question. per Auld LJ in *R v Broadmoor Special Hospital Authority, ex parte S, H and D* (CA Transcript at p.15)

43. The necessity relied on by Broadmoor is the corollary of their power and duty to detain a patient for treatment. Treatment is widely defined in s.145 Mental Health Act 1983 as interpreted by this court in *B v Croydon Health Authority* [1995] 1 AER 683. I can well understand that in certain cases publication may frustrate or undermine particular treatment being administered to a patient. But, in that event, the necessity would not be confined to publications by the patient alone but would extend to publications by third parties. In opening this appeal Mr Fitzgerald QC for Broadmoor limited the implication for which he contended to a power exerciseable in respect of the patient only. But in his reply he recognised that if the requisite necessity existed with regard to publications by the patient the power must extend also to publications by third parties. In my view that concession was right. Thus the real issue is whether a right or power for a special hospital to control publications liable to frustrate or undermine the treatment of one of its patients can be implied from the duties and functions imposed on it by statute.

44. The answer to the issue so formulated is, in my view, clear. A power of such constitutional significance is not to be implied. If Parliament is to grant such a power, and in my view it must be a matter for Parliament and not the discretion of the court, then it must do so in terms which admit of no doubt as to its intention. cf *R v Home Secretary, ex parte Pierson* [1997] 3 WLR 492, 507.

45. Even if the implication sought is limited to a power exerciseable in respect of publications of the works of the patient I do not consider that it can be made. It may well be desirable to have such a power, if only to back up that conferred by s.134, but that is not sufficient. *McCarthy & Stone (Developments) Ltd v Richmond upon Thames LBC* [1992] 2 AC 48, 70/71. I am not

satisfied that there is any necessity for it whether expressed as a self-evident or pressing need or otherwise.

46. S.134 entitles Broadmoor, subject to exceptions concerning MPs and similar persons, to intercept incoming and outgoing mail to or from a patient. But the conditions for the exercise of the power are strict. Outgoing mail from the patient may be stopped if it is likely to cause distress to any person, not being on the staff of the hospital, or danger to any person. Incoming mail addressed to the patient may be stopped if it is necessary to do so in the interests of the safety of the patient or for the protection of other persons. But the decisions of the managers of the special hospital in this respect are subject to review by the Mental Health Act Commission pursuant to s.121(7) Mental Health Act 1983.

47. The power Broadmoor contends should be implied would not be subject to the express safeguards built into s.134. It was suggested that the discretion of the court whether to grant an injunction and if so on what terms, could be used to provide equivalent safeguards. In my view that would not be sufficient. The court could only provide such safeguards in those cases where it was necessary to resort to the court. In many cases it would not be.

48. It was also suggested that the implication of the power would be inconsistent with the express provisions of ss.134-138 and the assumptions underlying s.134 Mental Health Act 1983. Ss.134-138 are all concerned with the control of the patient or his communications with persons outside Broadmoor. It is suggested that these provisions provide a code not susceptible of any further implication. S.134(9) provides that the exercise of the power contained in that section is not to constitute an offence under s.56 Post Office Act 1953. The suggestion is that if Broadmoor has the implied power contended for then its exercise could not have given rise to any offence under any of the relevant sections, including s.56, of the Post Office Act 1953 anyway. There is some force in each of these points but if the requisite necessity for the implication were made out then, in my view, it would override these considerations.

49. For all these reasons, which are essentially the same as those given by Poole J for discharging the injunctions, I would dismiss this appeal.

50. Counsel for R also submitted that if there were any such power as Broadmoor contended for then it could not be enforced by injunction against R at the suit of Broadmoor. It was submitted that there was no private law cause of action within which an injunction could be granted consistent

with the decisions of the House of Lords *in British Airways v Laker Airways* [1984] 3 WLR 413 and *South Carolina Insurance Co. v Assurantie NV* [1986] 3 WLR 398. If there was the power contended for then, it was submitted, it existed in public law and was not enforcible by Broadmoor consistently with the decision of the House of Lords in *Gouriet v Union of Post Office Workers* [1978] AC 435 and of this court in *A-G v Blake* [1998] Ch.439, 459-461. The decision of this court in *Chief Constable of Kent v V* [1982] 3 WLR 462 was described as dependent on the unique position of a chief constable and devoid of any ratio decidendi capable of application in this case.

51. Had I reached a different conclusion on whether the requisite power could be implied I would, in agreement with the Master of the Rolls on this point, have concluded that it could be enforced by Broadmoor. I would have rested my conclusion on the simple ground that if Parliament is to be treated as having conferred the power then it must also have intended that Broadmoor might enforce it. In my view the power would be in the nature of a statutory right conferred on a particular person or class of person to be exercised as occasion required in the performance of their statutory functions. Powers have commonly been conferred on statutory undertakings, such as railway or canal companies, entitling them to go on the land of another for some purpose. So far as I am aware it has never been suggested, let alone decided, that such undertakings may not enforce such a right by injunction if necessary. By parity of reasoning if Broadmoor has the right to require R to deliver up the manuscript of his book and all copies of it in his possession or control or to prevent publication of it and needs an injunction to enforce it I can see no reason for denying the requisite jurisdiction to grant it.

52. For these reasons I agree with the Master of the Rolls that this appeal should be dismissed.

LORD JUSTICE WALLER:

53. I gratefully adopt the circumstances in which this appeal has arisen as described in the judgment of the Master of the Rolls. I have also read the judgment of Morritt LJ. I also agree that this appeal should be dismissed, but as there is not full agreement between Morritt LJ and the Master of the Rolls on the jurisdiction to grant an injunction, I ought to express my own views on that aspect shortly.

54. First, let me say in agreement with both my lords, that the distress that may be caused to the victim's family is a matter of great regret and one hopes that the publishers of the book will think again in any event. But if the Authority were entitled to obtain an injunction to restrain publication

simply on the basis of the distress to the family of the victims, then, since I see no distinction between the position of a victim of a patient in Broadmoor from the position of a prisoner, or for that matter an ex-prisoner from any prison, it would follow that every prison could bring an action to assist victims. Their statutory powers do not on any view extend so far.

55. Second, let me also say that as regards breaches of the confidence of other inmates, I agree with the Master of the Rolls that it is not within the Authority's statutory power to protect those. To protect those confidences, proceedings would have to be by or on behalf of those patients.

56. On the important question of the Authority's powers and the circumstances in which it can seek the aid of the court, I respectfully agree with the Master of the Rolls and would adopt his ultimate formulation which is in these terms:-

> "If a public body is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the court should grant such an application when "it appears to the court to be just and convenient to do so.""

57. It seems to me that if someone interferes with the carrying out by a statutory authority of its statutory duty, there should be no reason in principle why the court should not come to the assistance of the statutory authority, and, if the circumstances make it "just and convenient", grant an injunction. Thus, for example, if a third party were to set out to frustrate the Authority in its treatment of a patient, I can see no reason why the court should not grant an injunction to prevent that conduct. If a third party attempted to interfere with the discipline at Broadmoor, I would see no reason why the court should not assist the Authority by injunction if necessary. The example of someone sending in letters designed to hinder the treatment of a patient, or to encourage breaches of discipline, seem to me to be situations where the court might well interfere.

58. Where I think that I differ from the Master of the Rolls and perhaps come nearer to Morritt LJ relates to the facts of the instant case. It seems to me impossible to categorise the activity of "R" as interfering with the performance of the Authority's public responsibilities. His conduct cannot be said to have been designed to frustrate his treatment or the treatment of others. Thus it would be my view that the injunction cannot fairly be said to being sought to prevent interference with the performance of the Authority's public responsibilities, and I would refuse to grant an injunction on that ground alone.

59. If, contrary to what I have said, the only question to consider is whether in the court's discretion an injunction should be granted, having regard to the powers that the Authority do have to prevent patients within the hospital seeing material, I would, in addition to the points that the Master of the Rolls makes on discretion, have refused the injunction.

Order: Dismissed with costs subject to detailed assessment; leave to appeal to the House of Lords refused.

TAB 20

Attorney-General for Ontario v. Grabarchuk et al.

(1976), 11 O.R. (2d) 607

1976 CanLII 574 (ON SC)

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT
DONOHUE, KEITH and REID, JJ.
6TH JANUARY 1976

Injunctions -- Interim injunctions -- Availability -- Enforcement of penal statute -- Statute providing penalties for violation of its provisions -- Whether interim injunction should be granted in circumstances -- Public Commercial Vehicles Act, R.S.O. 1970, c. 375.

Injunctions -- Interim injunctions -- Criteria -- Penal statute continually flouted by party -- Whether usual criteria of balance of convenience and irreparability of apprehended damage applicable -- Public Commercial Vehicles Act, R.S.O. 1970, c. 375.

Statutes -- Enforcement -- Statute providing penalties for violation -- Whether interim injunction may be granted to Attorney-General where statute continually flouted by party -- Public Commercial Vehicles Act, R.S.O. 1970, c. 375 -- Ministry of the Attorney General Act, R.S.O. 1970, c. 116, ss. 5(d), 19.

The Attorney-General, as the protector of public rights and the custodian of the public interest, is entitled to obtain an injunction where a statute is being flouted. This is so even though the statute in question provides penalties for violation of its provisions where the statute continues to be disregarded despite the imposition of such penalty. Furthermore, in determining whether an interim injunction should issue in such

a case, the usual criteria of the balance of convenience and the irreparability of the apprehended damages are irrelevant, since there is irreparable damages in any event.

[Attorney-General v. Premier Line, Ltd., [1932] 1 Ch. 303; Attorney-General v. Ashborne Recreation Ground Co., [1903] 1 Ch. 101; A.-G. Alta. ex rel. Rooney v. Lees and Courtney, [1932] 3 W.W.R. 533; Attorney-General v. Harris, [1961] 1 Q.B. 74; Attorney-General v. Smith et al., [1958] 2 Q.B. 173, apld; Public Accountants Council v. Premier Trust Co., [1964] 1 O.R. 386, 42 D.L.R. (2d) 411; Cowan v. Canadian Broadcasting Corp., [1966] 2 O.R. 309, 56 D.L.R. (2d) 578; Terra Communications Ltd. et al. v. Communicomp Data Ltd. (1973), 11 O.R. (2d) 682, 41 D.L.R. (3d) 350; American Cyanamid Co. v. Ethicon Ltd., [1975] 2 W.L.R. 316, refd to]

APPEAL from the judgment of Galligan, J., 9 O.R. (2d) 465, 60 D.L.R. (3d) 633, dismissing an application for an interim injunction.

D.W. Brown and J. Kelly, for plaintiff.

Donald J. Catalano, Q.C., for defendants.

DONOHUE, J., concurs with KEITH and REID, JJ.

KEITH, J. (orally):-- I agree with the judgment that has been pronounced on behalf of the Court by my brother Reid. I would like to add, however, several points.

In the first place, I think it should be emphasized that the Attorney-General appellant has brought before this Court a very strong prima facie case which, of course, is the first of the criteria that one normally looks for in an application for either an interim or an interlocutory injunction.

I would also like to add, with respect to the status of the

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Attorney-General, a quotation from the judgment of Lord Goddard, then Chief Justice, in the case of Attorney-General v. Smith et al., [1958] 2 Q.B. 173 at p. 185:

> It has been submitted to me that because the Act provides penalties, and because there is no offence committed before an enforcement notice has been disregarded, I ought not to grant an injunction. I think that the cases which have been cited -- particularly Attorney-General v. Wimbleton House Estate Co. Ltd., [1904] 2 Ch. 34, cited and followed by Devlin J. in Attorney-General v. Bastow, [1957] 1 Q.B. 514 -- show that, although a statute may provide a penalty for acts done in breach of it, if it is a matter of public right, then the Attorney-General is entitled, on behalf of the public, to apply for an injunction.

Finally, I would like to say that it is perhaps regrettable that s. 5(d) of what was at one time the Department of Justice Act and now the Ministry of the Attorney-General Act, R.S.O. 1970, c. 116, was drawn to the attention of Mr. Justice Galligan who heard this application in the first instance. It seems to me that the language of that statute in its initial part, is so applicable to bring into play and effect the English cases and those words that I have in mind are as follows:

> 5. The Minister,
>
> (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario ...

REID, J. (orally):-- The Attorney-General moved to enjoin the defendants from carrying on business without a licence contrary to the provisions of the Public Commercial Vehicles Act, R.S.O. 1970, c. 375. The motion came on before Mr. Justice Galligan, who dismissed it on two grounds. First, he was not satisfied that the remedies provided in the statute itself were shown to be insufficient for the enforcement of the statute and, second, that the question whether the Ontario Courts should follow the

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English practice in such cases was one of novelty and difficulty and should not be decided on a motion for an interim injunction.

The motion was supported by the affidavit of William Gregory dated March 25, 1975. Some objection to its form, but no real challenge to its content, was offered by the respondents. The affidavit was tested by a lengthy cross-examination comprising 121 pages of transcript. The grounds for the statements made by Mr. Gregory were vigorously probed. As a result, voluminous documents were produced by the Attorney-General and entered as 39 exhibits. The affidavit of Mr. Gregory itself had a number of exhibits attached. Further affidavits were filed by the Attorney-General. No evidence was filed by any respondent, apart from cross-examination and exhibits alluded to.

The result was a formidable parcel of documents and testimony. The cross-examination did not seriously challenge Mr. Gregory's affidavit, indeed, it appears to have supplemented and substantiated it.

Exhibit D to the Gregory affidavit is a decision of the Ontario Highway Transport Board dated March 7, 1973. Mr. Gregory's affidavit, in relation to the events leading up to that date, is consistent with the facts established before the Board, as evidenced by the Board's decision.

The events leading up to the hearing before the Board can be summarized. Respondent Vanstor Transport Company Limited held a number of licences enabling it to operate within and outside Ontario as a carrier of goods. This commenced in 1963. As a result of Vanstor's failure to obtain complementary licences from the transport boards of other Provinces, numerous public complaints about its service, and frequent convictions for various offences, including carrying on business without a licence under the Public Commercial Vehicles Act, the Ontario Highway Transport Board was obliged to call the company in for a review of its licences on six different occasions before February, 1973. In February, 1973, the final review occurred.

Vanstor operated from a warehouse and terminal in Richmond

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Hill, Ontario. It carried on business under a variety of names, including World-Wide Shipping and Central Van & Storage. The final review conducted by the Board occurred on three days in February, 1973, and resulted in the Board's order of March 7th to which I have referred.

On the hearing Mr. Grabarchuk appeared to be the chief witness for Vanstor. The Board found that he was known also as Frank Gray, that he was the president and a majority shareholder of Vanstor and that he also operated the business of World-Wide Shipping, whose offices were in the same building as Vanstor and Central Van & Storage.

The Board further found that Vanstor had violated the Public Commercial Vehicles Act, had operated the business of transporting household effects while its licence was suspended, had booked shipments into places outside Ontario, notwithstanding that it had no licence to do so and that it carried on business with "disregard" for the Public Commercial Vehicles Act and the Motor Vehicle Transport Act, R.S.C. 1970, c. M-14, and that Frank Grabarchuk had been arbitrary and abusive with customers. It concluded that in the public interest all the licences of this company should be withdrawn, and revoked all the company's existing certificates.

We were told that this decision was challenged in the Divisional Court and in the Court of Appeal during the balance of 1973, but apparently without effect.

By virtue of s. 9 [am. 1971 (Ont.), Vol. 2, c. 50, s. 71(5)] of the Public Commercial Vehicles Act, Vanstor's licences appear to have expired for having failed to be renewed on July 1, 1973. I make that observation because it was suggested that the Board's order withdrawing the licences might be ineffective because it had been challenged in the Courts. The operation of s. 9, however, would appear to have effectively deprived Vanstor of its licences, irrespective of the action of the Transport Board.

After the Board's decision a new company was incorporated. It was called 270012 Ontario Limited and it came into being on

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May 2, 1973. Again, Mr. Grabarchuk was the president and was as well one of the two directors. The company's head office was 360 Newkirk Rd. in Richmond Hill, the address of the warehouse referred to. The company carried on business as Central Truck Rentals, Central Leasing and Central Van Leasing and its business appears to have been substantially the business that Vanstor had previously carried on. Vanstor, however, continued to carry on its business without regard to the decision of the Transport Board. Both companies were by then carrying on the business of movers and storers under their own and various other names without concern for the fact that the Board had acted to withdraw Vanstor's authority and that the numbered company had never troubled to apply for and, of course, had never received a licence under the Public Commercial Vehicles Act.

From March, 1973, to April, 1973, Vanstor was convicted on at least seven occasions of carrying on business without a licence contrary to s. 2(1)(a) [rep. & sub. 1973, c. 166, s. 2] of the Public Commercial Vehicles Act. The numbered company was convicted of a number of offences. One was registered under a business name, either Central Leasing or Central Leasing Limited (the latter appears to be a misnomer). This conviction was for operating without a licence contrary to s. 2(1)(a) of the Public Commercial Vehicles Act. These offences occurred at various places throughout Ontario, well outside the urban limits of Richmond Hill and they therefore brought the respondents' conduct within 2(1)(a) of the Public Commercial Vehicles Act.

Mr. Grabarchuk's name appears on numerous applications and documents submitted on behalf of various of the defendants including applications for licences and permits. There appears to be not the slightest doubt that he has been the instigator and the operator of these companies both limited and unlimited, and that he has carried on with a striking disregard for the Public Commercial Vehicles Act and the Motor Vehicle Transport Act. Numerous fines levied against various of the respondents have not been paid. The process of charge, conviction and fine has been without any ascertainable effect. Mr. Grabarchuk goes on his merry way, secure behind his various names and leaving

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in his wake grumbling customers and frustrated officialdom.

This, as I have said, is the clear impression left by the evidence. Nothing to contradict it was filed by any respondent. Nor was the basic thrust of this evidence seriously contested by respondents' counsel.

To the application, two major defences were raised. First it was submitted that the criteria applying to an application for an interim injunction in suits between private parties had not been satisfied. Second, that there is no precedent in Ontario for the Court to assist in this way the enforcement of a statute which contains its own penalty. I shall deal with these submissions but first, I must refer to the ground upon which the Attorney-General rests his application.

The Public Commercial Vehicles Act states:

> 2(1) No person shall operate a commercial vehicle on a highway for the transportation for compensation of goods of any other person unless,
>
> (a) pursuant to an operating licence;

At s. 16 [am. 1973, c. 166, s. 12] the Act provides:

> 16. Every person who contravenes any of the provisions of this Act or the regulations is guilty of an offence and on summary conviction is liable to a fine of not less than $50 and not more than $1,000.

There are numerous precedents in England and Australia for the proposition that the Attorney-General, as the protector of public rights and the public interest, may obtain an injunction where the law as contained in a public statute is being flouted. This is so notwithstanding that, (a) the statute itself may contain penalties of a different kind, and (b) all possible alternative remedies have not been exhausted. The position of the Attorney-General as custodian of the public interest is the same whether one speaks of England, Australia or Canada. This is clear from such decisions as the Public

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Accountants Council v. Premier Trust Co., [1964] 1 O.R. 386, 42 D.L.R. (2d) 411, and Cowan v. Canadian Broadcasting Corp., [1966] 2 O.R. 309, 56 D.L.R. (2d) 578. In the latter case, Mr. Justice Schroeder said for the Court of Appeal [at p. 314 O.R., p. 583 D.L.R.]:

> Under our law, the Attorney-General is by law the representative of the public interests which are vested in the Crown and are enforceable by the Attorney-General as the Crown's officer.

The Attorney-General's position is established not only by statements of our Courts, but as well by the Department of Justice Act [renamed Ministry of the Attorney General Act by 1972, c. 1, s. 9(1)], R.S.O. 1970, c. 116, which states, in reference to the Attorney-General:

> 5. The Minister,
>
> . . . . .
>
> (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage ...

Next, is there precedent for the Attorney-General's request? There is in my view ample authority for an exception to the general rule that where an Act creates an offence and provides a remedy, the only remedy is that provided by statute.

In Attorney-General v. Premier Line, Ltd., [1932] 1 Ch. 303 at p. 313, Eve, J., stated the rationale of the exception. He said:

> The public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in so doing, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the Attorney-General intervening for the purpose of asserting public rights, and if he does so the general rule no longer operates; the

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dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land.

In numerous decisions cited before us, this concept has been applied to enjoin conduct that was otherwise apparently beyond restraint. As Buckley, J., said in Attorney-General v. Ashborne Recreation Ground Co., [1903] 1 Ch. 101 at p. 108:

> Moreover, there may be good reason why an injunction should be granted although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made by-laws ... that cannot be the intent of the statute.

This principle is firmly embedded in the law of England and of Australia as the extracts given to us from Professor Thio's and Professor Hogg's works show: S.M. Thio, Locus Standi and Judicial Review (1971), p. 133, ff.; Peter Hogg, Crown Liability (1971), p. 401, ff.

It has as well been recognized in Canada. In A.-G. Alta. ex rel. Rooney v. Lees and Courtney, [1932] 3 W.W.R. 533 (Alta. S.C.), McGillivray, J.A., said at p. 542:

> In the case at bar it is shown that the violations of the Act by these defendants have been open and continuous and that the imposition of penalties has had no effect as a deterrent. It is also clear that the defendants intend to continue as in the past unless restrained by the Court from so doing. In these circumstances I think that I should exercise my discretion in favour of granting an injunction.

In A.-G. Ont. v. Wilson (unreported, released October 11, 1974), Weatherston, J., granted an injunction to prevent conduct that could have been the subject of a prosecution under the Public Lands Act, R.S.O. 1970, c. 380.

I turn to the argument with respect to the application of what might be called the usual criteria. As between private

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parties, the justice and convenience of an interlocutory injunction is usually decided in the light of a number of elements. These include the balance of convenience and the irreparability of the apprehended damage (see Terra Communications Ltd. et al. v. Communicomp Data Ltd. (1973), 1 O.R. (2d) 682, 41 D.L.R. (3d) 350). There has in England been some recent reappraisal of these criteria and how they should be applied. I refer particularly to American Cyanamid Co. v. Ethicon Ltd., [1975] 2 W.L.R. 316, and Fellowes v. Fisher, [1975] 2 All E.R. 829, and I refer to these cases for the purpose of indicating that the criteria are not unvarying and are not written in stone. Nor do they appear to me to be easily applicable to a claim of the type before us. Many actions go no further than the interim injunction. The criteria are then to assist a Court to decide whether to grant a party some kind of relief other than damages, that is, to interpose a kind of relief rather than the usual relief sought in the law Courts, which is damages. There is no claim for damages here nor could one be asserted. The criteria would therefore appear to be irrelevant.

But even if this were not so, it would appear to me to be eminently just -- to get back to the criteria stated in s. 19 of the Judicature Act, R.S.O. 1970, c. 228 -- that an injunction should go in the circumstances before us. One who knowingly and deliberately flouts the plain law can hardly argue that it is not just that he be stopped. Damages are not an adequate remedy, for none can be claimed.

As for convenience, it is one thing to argue (as in Fellowes v. Fisher) that the balance of convenience lies with a clerk, notwithstanding that he appears to be in violation of a restrictive covenant, because the hardship to him of a wrongly granted interlocutory injunction would exceed the hardship to his former employers -- a firm of solicitors -- caused by withholding one. It is another thing, however, to see how the concept applies to assist skilled, persistent, substantial defendants who include two corporations and whose record for violating the law goes back a long time and who can only profit by continuing such conduct.

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Mr. Catalano pointed to some of the words used by Weatherston, J., in Attorney-General v. Wilson as a recognition of the applicability of the test of irreparable damage. To me, in the context of that judgment, they mean no such thing. Rather, they appear merely to be another way of expressing the futility of invoking the penalties provided in the statute as a rationale for the grant of the injunction in that case.

In my opinion, there is no basis for the application of the usual criteria. If, however, they were applicable I would think that the justice and convenience of the matter lie on the Attorney-General's side. He has a strong prima facie case. If irreparable damage to the public interest must be shown I agree with and apply the following. In Attorney-General v. Harris, [1961] 1 Q.B. 74 at p. 95, Pearce, L.J., observed:

> ... a breach with impunity by one citizen leads to a breach by other citizens, or to a general feeling that the law is unjustly partial to those who have the persistence to flout it.

Respondents argued that the authorities relied on by the Attorney-General are for the most part judgments made after trial and therefore are inapplicable to an application on an interlocutory motion. I cannot see how the principle expressed in those judgments is affected by the time when an application is made or granted. It applies equally to the grant of an interim or a permanent injunction.

The application made to Galligan, J., was one that sought to enforce the Public Commercial Vehicles Act from at least March of 1973. It is obvious from the material filed, that throughout 1973 and indeed throughout 1974, respondents managed to carry on business without regard either for the Act or for the decisons of the Board. I have difficulty in accepting that it would be just or convenient to defer the decision on this matter until trial when it is well known that a trial would take some time to reach.

There appears to be little room for doubt about the material facts of this case. There is no doubt that defendants have

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persistently flouted the law. That being so, deferring the application until trial so that material facts may be developed would appear to be unjustified. In my view, Galligan, J., and we, sitting as the Divisional Court, are at least as well positioned as a Judge at trial to decide questions of law. I therefore fail to see the force of the argument that the principle expressed in the judgments I have referred to should be invoked only after trial and not on an interlocutory motion.

It is also argued that the injunction should not be invoked as an added penalty to enforce the criminal law but that is not the case before us.

Galligan, J., referring to precedent, expressed reluctance to decide a difficult and novel point on a motion for interim injunction. With great respect, I do not find the point novel in light of the formidable amount of authority that has been cited to us although it is true that the bulk of the authority has been developed in other jurisdictions. Nor is there any great difficulty apparent in its application. We have had the advantage of a lengthy argument by capable counsel. I cannot see how any advantage would be gained in a case where the material facts are so plainly established and indeed are basically uncontested, to defer the decision to trial.

Mr. Catalano finally argues that if the injunction goes, it should not go against all named respondents because there is insufficient or no evidence in respect of some of the various respondents. My impression is that the names are, to a large extent, a smoke screen for operations carried on by Mr. Gray behind various partnership names and corporate identities that are little more than names. They are not really different entities. If an injunction were restricted to some names and not to others, then Mr. Gray's purpose would be fulfilled and this proceeding largely frustrated notwithstanding its apparent success. It would leave Mr. Gray and his companies free to create other companies, either incorporated or by way of partnership, who would then be free of the effect of an injunction and permit him to carry on a conscious flouting of the law. Future possible names would be limited only by the extent of their progenitors' vocabulary or the list of numbers

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available for limited companies. In my view, if an injunction should be granted, it should be granted in such a way so as to prevent this pattern from being continued and Mr. Gray restrained, whatever his disguises.

The following has been endorsed on the record:

1. Appeal allowed.

2. Order to go restraining until trial or other disposition of the action defendants Frank Grabarchuk, also known as Frank Gray, Vanstor Transport Company Limited, 270012 Ontario Limited, their servants or agents and anyone acting on their behalf from carrying on business without a licence under the Public Commercial Vehicles Act or an extraprovincial operating licence and thus contravening s. 2(1)(a) of that Act, either directly or indirectly, through the use of the partnership names included among the respondents or other names or through the use of limited companies.

3. Costs throughout to applicant.

4. Leave granted to either party to apply to Judge presiding in assignment Court for a fixed date for trial as soon as case placed on ready list.

Appeal allowed.

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TAB 21

COURT FILE No.: Central East - Newmarket 4911-999-07-0384-00
DATE: 2011·09·28
Citation: *R. v. Schmidt*, 2011 ONCJ 482

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under clause 116(2) (a) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Appellant

— AND —

MICHAEL SCHMIDT
Respondent

Before Justice P.D. Tetley
Heard on April 13, 2011
Judgment released on September 28, 2011

Alan E. Ryan, Ministry of Natural Resources, Legal Services Branch; John D. Middlebro' and Kelly Graham, Middlebro' & Stevens LLP – Grey Bruce Health Unit; and Michael Dunn, Ministry of the Attorney General, Constitutional Law Branch ..... for the Appellant
Karen Selick, Canadian Constitution Foundation ..... for the Respondent

On appeal from the dismissal of all charges by Justice of the Peace P. Kowarsky on January 21, 2009.

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Evidentiary summary of the trial testimony of the Crown Witnesses:

- Ministry of Natural Resources Investigator Susan Atherton
- Ministry of Natural Resources investigator

  Victor Miller
- Ministry of Natural Resources lead investigator

  Brett Campbell
- Grey-Bruce Health Inspector Andrea Barton
- Grey-Bruce Health Inspector Christopher Munn

  Trial Testimony of the Witness called by the Defence
- Michael Schmidt
- Cow-share member – Eric Bryant

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TETLEY J.:

1. **<u>Background</u>**

[1] The Respondent, Michael Schmidt, is a farmer and a committed, vocal and highly visible advocate, for the facilitation of greater public access to what he refers to as "farm fresh" or unpasteurized "raw" milk. This is a Crown appeal from the Respondent's acquittal on nineteen charges relating to the production and distribution of raw milk and milk products under the *Provincial Offences Act*, R.S.O. 1990, cP.33 (hereinafter P.O.A.). The subject matter of this appeal involves the distribution and consumption of "raw" or unpasteurized milk in the Province of Ontario. It also entails a review of the parameters of the law that tacitly authorizes the consumption of raw milk by members of certain "farm families", a substance the Appellant categorizes as constituting a potential public health hazard, while effectively restricting consumption by other interested, non-farm based, consumers. The constitutional implications of certain statutory provisions to the Respondent's "cow-share" programme also forms part of the reasons in this appeal.

[2] Surprisingly, given the Appellant's position as to the pervasive risks to public health arising from human consumption of raw milk, it is not against the law to consume unpasteurized milk in Ontario. That lawful entitlement is subject, however, to significant legal restriction that appears to be designed to control or restrict consumption of raw milk to those who actually produce the milk. Although personal consumption of raw milk is legally authorized, for practical purposes, raw milk consumption has effectively been legislatively limited to the dairy farmer and members of his or her immediate family. Those individuals comprise the so called "farm family exemption".

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[3] An example of the statutory curtailment of the lawful entitlement to consume raw milk is apparent in Section 15(1) of the *Milk Act*, R.S.O. 1990, c. M.12 (hereinafter *Milk Act*). That provision mandates that all milk plants (which include a milk transfer station or premises where cream or milk is processed) be licensed by "the Director" appointed by regulation under the *Act*. Sections 18(1) and 18(2) of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 (hereinafter *H.P.P.A.*), further limit consumer access by effectively prohibiting both the sale, delivery and/or distribution of unpasteurized milk, cream or other processed milk products or products derived from raw milk..

[4] **Section 18(1**) of the H.P.P.A. deals with milk and provides as follows:

> (1) No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*, R.S.O. 1990, c. H.7, s. 18 (1).

Section 18(2) deals with milk products and provides:

> (2) No person shall sell, offer for sale, deliver or distribute a milk product processed or derived from milk that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*, R.S.O. 1990, c. H.7, s. 18 (2).

Section 18(3) references as authorized exception provides:

> (3) Subsection (1) does not apply in respect of milk or cream that is sold, offered for sale, delivered or distributed to a plant licensed under the *Milk Act*, R.S.O.1990, c. H.7, s. 18 (3).

[5] Presumably, if a resident enjoys ownership of the means of production, a cow, that individual, together with members of their immediate family, can consume raw milk with impunity. This issue was considered in an earlier proceeding involving a 1994 regulatory review of a Public Health Inspector's Order directing that the Respondent cease and desist from selling unpasteurized milk and milk products. In that review, the

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Health Protection Appeal Board, a specialized tribunal with jurisdiction to review the decisions of *H.P.P.A.* inspectors, defined the parameters of the legal entitlement to consume unpasteurized milk as follows:

> The *H.P.P.A.* does not state clearly that members of "farm families" may consume unpasteurized milk and milk products; rather, the exception which allows them to do so is implicit. Section 18 of the *Act* does not prohibit the consumption of unpasteurized milk or milk products in a private residence. Similarly, the definition of "food premise" contained in section (1) (1) of the *Act*, and further refined in section 2(1) of Regulation 562, R.R.O. 1990, excludes a private residence. The effect of these definitions is to preclude the application of section 42.52 of Regulation 562, which sets out pasteurization requirements to a private residence. The only reason that a private residence of a "family farm" differs from a private residence of anyone else *vis-à-vis* consumption of unpasteurized milk and milk products, is that the members of "farm families" have access through a means not prohibited by section 18 of the *Act*. (Health Services Appeal and Review Board – Reasons for Decision – September 1, 1994 p. 11)

[6] During the course of the trial proceedings now under review, the prosecution sought to rely on a similarly restrictive definition of the "farm family exemption" in support of the position that the lawfully authorized entitlement to consume unpasteurized milk in Ontario is effectively restricted to the milk producer or dairy farmer and his or her family. The Appellant submits that the health risks associated with a more expansive interpretation of the "farm family" exemption serve to create a risk to public health generally. As public welfare legislation, a broad, purposeful approach to statutory interpretation is contended as being warranted, an interpretation that would effectively restrict access to unpasteurized milk for consumption purposes to those that produce it and members of their immediate family. See: *Ontario (Ministry of Labour) v. Hamilton City* [2002] O.J. No. 283 (C.A.); *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (C.A.) at 27; *R. v. Rizzo and Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27. It is submitted that the trial justice erred in concluding that the defendant's "cow-share" programme complied with

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the applicable provisions of the *H.P.P.A.*

2. The Respondent's Cow-Share Programme

[7] The Respondent, who was unrepresented at trial, is the sole proprietor of Glencolton Farms located at 393889 Lot 44, Concession 3 EGR, Municipality of West Grey, near Durham, Ontario. The farm is described by the Respondent as a "biodynamic organic operation". It encompasses 100 acres of land and features a detached barn containing dairy equipment, refrigerated storage rooms, milking and processing areas, plus a blue bus used to transport milk and other farm products to the cow-share members in the GTA. At the time the charges in issue arose in late 2006, 24 dairy cows formed the resident herd on the premises. The farm also includes a detached farm store where various farm products were located including milk, cream, cheese and other products produced on the farm, such as eggs and meat.

[8] The Respondent holds a Masters degree in agriculture. He immigrated to Canada from Germany in 1983 and originally operated a dairy farm within the quota system governing the distribution of milk in the Province of Ontario. In 1992, he cancelled his contract with the Milk Marketing Board and created a "lease-a-cow programme". That programme enabled interested consumers of unpasteurized milk to hold leasehold interests in the Respondent's cows in an effort to effect compliance with the restrictions against the sale or distribution of unpasteurized milk and milk products in s. 18(1) and s. 18(2) of the *H.P.P.A.*

[9] On February 23, 1994, the Respondent was charged with contravening s. 18

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of the *H.P.P.A.* He was subsequently convicted of that offence and an offence under the *Milk Act* and fined $3,500 and placed on probation for a period of two years. A permanent restraining Order was issued by an *H.P.P.A.* inspector at that time. The Order directed that the Respondent cease "the manufacturing, processing, preparation, storage, handling, and display of unpasteurized milk and milk products." The alleged breach of that Order forms the subject matter of three of the charges in issue in this appeal.

[10] As an enthusiastic and longstanding proponent of the health benefits to be derived from the consumption of raw milk, the Respondent has personally endured significant personal stress and financial hardship as a consequence of his dedication to this issue. The legal costs associated with the defence of the 1994 prosecution lead to the eventual sale of five hundred acres of, his then, six hundred acre Glencolton farm and the sale of most of the dairy herd. Despite this setback, the Respondent was undeterred. Near bankruptcy, he reorganized and, in due course, instituted a "cow-share" programme. This arrangement was intended as a private "contractual" agreement between the Respondent, in his capacity as the sole proprietor of Glencolton Farms, and interested raw milk consumers, where cows are fractionally owned by the ultimate consumers of the raw milk they produce. In consideration of receipt of a capital sum, interested non-farmed based, consumers secure access to raw milk and raw milk products. The Respondent acts as the herdsman or "agister" and receives compensation in consideration of the capital cost of the dairy cow ($1200) and additional compensation for the costs of production and labour. The arrangement was designed with the intention that the cow-share members would have a defined legal interest in a particular cow in the Glencolton Farms' herd.

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Individual shareholders pay increments of three hundred dollars to the Respondent in exchange for a one quarter interest in one of the dairy cattle at his farm. The arrangement includes the transport of the raw milk and raw milk food product to the GTA where the majority of the cow-share certificate holders reside. The trial record indicates this cow-share programme has been in operation since 1996. It initially involved ten members. There were one hundred and fifty cow-share members at the time the charges now under review were laid. Despite the fact this arrangement was purportedly known to the local public health authority and operated in an open and public manner, it did not attract official scrutiny and subsequent intervention from government authorities until the fall of 2006.

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3. <u>The 2006 Charges</u>

[11] As noted, the trial justice dismissed all nineteen of the charges against the Respondent. Seventeen of the charges were laid by the Ministry of Natural Resources (M.N.R.) and allege infringement of s. 18(1) and s. 18(2) of the *H.P.P.A.* Fourteen of those charges arose from five distinct transactions involving an undercover investigator Susan Atherton, and the purchase of raw milk, or raw milk products, between August 22, 2006 and November 21, 2006. Three of the impugned transactions involved unpasteurized milk products on the aforementioned blue bus. The two others took place at the Respondent's farm. Each transaction involved a purported sale to the undercover operative, which is also alleged to constitute the offence of unlawful distribution of unpasteurized milk or milk products. The first two transactions (August 22, 2006 and October 17, 2006) include the purchase or gratuitous receipt of cheese when the

undercover operative was not yet a cow-share member. The other transactions occur after Ms. Atherton became a cow-share member. Each includes either a cash purchase or the uncompensated receipt of unpasteurized milk or milk product. The three remaining charges under the *H.P.P.A.* include failing to obey the 1994 "cease and desist" Order issued by the Public Health Inspector, on three separate dates, by storing and displaying unpasteurized milk and milk products contrary to s. 100(1) of the *Act*. Section 100(1) of the *H.P.P.A.* provides that, "any person who fails to obey an Order made under this *Act* is guilty of an offence."

[12] In addition to the charges under the *H.P.P.A.*, two offences in violation of the *Milk Act* were prosecuted. The *Milk Act* infractions include charges of operating a plant in which milk, or cream, or milk products were processed without a licence from the Director, contrary to s. 15(1) of the *Milk Act* and carrying on a business as a distributor of fluid milk products without a licence from the Director authorizing such a business, contrary to s. 15(2) of the *Milk Act*. The Appellant formally abandoned the appeal of the acquittal on the distribution count leaving only one count alleging infraction of the *Milk Act* to be considered in this appeal (the s. 15(1) offence). A summary of the evidence presented by the prosecutor at trial is located at paragraphs 20 to 31 of this judgment.

[13] The applicable provisions of the *Milk Act* are as follows:

> Licences
>
> Licence to operate plant
>
> **15. (1)** No person shall operate a plant without a licence therefore from the Director. R.S.O. 1990, c. M.12, s. 15 (1).
>
> Licence to operate as distributor
>
> **(2)** No person shall carry on business as a distributor without a licence therefore from the Director. R.S.O. 1990, c. M.12, s. 15 (2).

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4. Summary of the Trial Record

[14] Excluding the evidence offered by four expert witnesses in relation to the Respondent's *Charter* application, the entirety of the testimony presented at the Respondent's trial is attached, in summary form, as Appendix "A" to this appeal judgment.

[15] The acknowledged facts arising from an Agreed Statement of Fact and the Respondent's statement follows. The case for the prosecution is also outlined and evidentiary references provided in respect to the various offences alleged. Similarly, the position of the defence at trial is reviewed with reference to the trial record.

(A) Agreed Facts and the Respondent's Statement

[16] The trial featured an acknowledgment by the Appellant of a number of significant facts by way of an Agreed Statement of Fact, including the following: Michael Schmidt is the operator of Glencolton Farms. There was no pasteurization or sterilization of any dairy products produced, on display, stored or distributed by Glencolton Farms (Agreed Facts, para. 4, p. 47, January 26, 2009 Trial Transcript). Michael Schmidt is a dairy farmer who carries on a sole proprietorship under the name of Glencolton Farms, which was registered under the *Business Names Act*, R.S.O.: 1990, c B17 (p. 42, January 26, 2009 Trial Transcript). The Appellant set up a cow-share programme in which people pay for a six-year membership with $300 being charged for a quarter interest in a cow, $600 for half a cow and $1,200 for a full cow (pp. 49-50, January 27, 2009 Trial Transcript).

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[17] At no time did the Respondent apply for, or obtain, a licence to operate this or any other plant within the provisions of the *Milk Act*. At various times between the offence dates August 17, 2006 - November 22, 2006, Mr. Schmidt transported his dairy and other products from Glencolton Farms to the parking lot of Waldorf School in Thornhill for sale to "customers". In response to a clarifying question from the trial justice the Respondent acknowledged that he sells all kinds of fresh produce and baked goods. He has a farm store. He operates a blue bus that drives to a certain location in the greater Toronto area and offers farm products for sale with the exception of milk and milk products. These are provided for a fee to people who are registered as cow-share members (p. 50, January 27, 2009 Trial Transcript).

[18] In 1994, Mr. Schmidt was operating a similar farm store in Grey County, where he was selling and distributing unpasteurized milk and milk products under a "leasing" scheme. An Order was issued against him by a health inspector under s. 13 of the *H.P.P.A.* The Order directed the Respondent to stop "manufacturing, processing, preparation, storage, handling, display of unpasteurized milk and milk products" because such products were known to transmit disease to humans. On review of the health inspector's Order, the Health Protection Appeal Board held that raw milk was a health hazard, as defined under the *H.P.P.A.*, and expanded the prohibition Order against Mr. Schmidt (pp. 55-57 and 61, January 26, 2009 Trial Transcript).

The Respondent's Statement

[19] During the execution of a search warrant at Glencolton Farms on November 21,

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2006 the Respondent provided a statement to an investigator with the M.N.R. The statement was ruled to be voluntary and was read into the trial record by M.N.R. Conservation Officer Dan Herries (pp. 74-78, January 28, 2009 Trial Transcript). In the statement the respondent acknowledged the following:

- He is "totally aware" it is illegal in Ontario to sell or distribute milk or milk products that have not been pasteurized. He is not currently licensed to operate a milk plant by any level of government.
- He owns the business and is in charge of the production and distribution operation.
- All eggs, meat, grains and milk, including fresh milk, fresh cream and fresh cheese are produced on the farm.
- He sells bread, meat, cinnamon buns and brownies, and distributes milk and milk products, to cow-share members. The milk and milk products are not pasteurized.
- The cow-share programme is to allow people to obtain raw milk by drinking milk from "their" cow. Members are aware they are purchasing unpasteurized milk and milk products: "that's why they buy it, or get the cow."
- The membership costs vary according to the portion of the cow that is being purchased with prices varying from $300, $600 to $1,200. Members come at least twice a year to see their cow, to "come work here", to "come help", although they rely on his expertise and knowledge. The cow-share members are assigned a name for their cow. The name usually stays with the family, although he didn't know if the membership card actually reflects the specific name of the cow that any particular cow-share member may have an ownership interest in.
- The Respondent later contradicts this factual assertion when he is asked if a member receives milk only from the cow he/she purchases. He responds, "They receive milk from the herd as a total" (p. 76).
- The cost and duration of the cow-share membership is discussed, as well as what membership entails, as delineated in a "membership handbook". In response to the question about whether the membership card reflects the cow an individual cow-share member may own, the Respondent referenced the questioner to see the membership book. (It does not.)
- The raw milk product is sold and distributed at the farm on Fridays and on the "famous blue bus" on Tuesdays. The blue bus had 30 cases, each containing 12 litres of milk, at the time of the execution of the search warrant. Mr. Schmidt was getting ready to leave to meet approximately 100 of "his customers" when he was stopped by the police and M.N.R. officials.
- Cow-share members in Toronto pay $2.50/litre of milk, and members in the Durham area pay $2. The fee is not for the milk itself. The charge is for the Respondent's services and costs associated with milking, housing and feeding the cows and

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transportation costs.

(B) <u>The Prosecution's Case at Trial</u>

[20] The Respondent was charged with the offences in issue following the execution of a search warrant at Glencolton Farms on November 26, 2006. Prior to the culmination of the investigation, various M.N.R. personnel were deployed in an undercover capacity to investigate the suspected sale and/or distribution of unpasteurized milk and milk products by the Respondent. A detailed summary of the trial testimony of these witnesses is attached hereto as Appendix "A" to this appeal judgment.

[21] The most involved M.N.R. investigator, Susan Atherton, commenced the inquiry into the Respondent's cow-share programme on June 27, 2006. On that date she conducted surveillance on the Respondent and the blue bus as it was parked near the Waldorf School in Richmond Hill. On August 22, 2006, Ms. Atherton again attended at the blue bus and purchased a small quantity of soft cheese from the Respondent for the sum of $3.10. The Respondent advised the cheese was fresh and had been made shortly before it was purchased. Subsequent chemical analysis of the cheese confirmed it to be unpasteurized.

[22] On October 17, 2006, Ms. Atherton again purchased cheese from the Respondent, at the blue bus, for the sum of $3.20. During the course of this interaction with the Respondent the investigator inquired about a cow-share membership.

[23] On October 20, 2006 a cow-share membership was purchased. Individuals

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were noted to be buying milk and milk products at the store located at the Respondent's farm. Ms. Atherton also purchased milk and milk products after she had paid the $300 fee to become a member of the cow-share programme.

[24] The process was repeated on October 27, 2009. Ms. Atherton was accompanied by another M.N.R. Investigator, Victor Miller. Her purchases from the farm store that day included three jars of milk and a package of soft cheese.

[25] The investigators observed milk and cream to be located in coolers in the farm store. Cheese was noted as being made on the farm premises and milk appeared to be bottled there.

[26] On November 7, 2006, Ms. Atherton re-attended at the blue bus near the Waldorf School. She recalled purchasing a jar of milk from the Respondent for the sum of $7. She did not record amount of the purchase in her notebook. The Respondent disputed her recollection of that event at trial. Other people were noted to purchase milk and other farm produce at the bus.

[27] Following the execution of the search warrant at Glencolton Farms on November 21, 2006, the Respondent was charged with fourteen different offences under s. 18 (1) and s. 18 (2) of the *H.P.P.A.* As noted previously, s. 18 (1) prohibits the sale or distribution of unpasteurized milk or cream, with s. 18 (2) prohibiting the sale or distribution of unpasteurized milk products (including cheese).

[28] The charges were largely based on Ms. Atherton's undercover investigation and included the following:

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Offence Date	Item(s) Purchased or Received	Location of Purchase	Amount Paid	Charges
August 22, 2006	Cheese	Blue bus	$3.10	s. 18 (2) x 2
October 17, 2006	Cheese	Blue bus	$3.20	s. 18 (2) x 2
October 20, 2006	Milk and cheese	Glencolton Farms' Store	$30.00	s. 18 (1) x 2 s. 18 (2) x 2
October 27, 2006	Milk and cheese	Glencolton Farms' Store	unknown	s. 18 (1) x 2 s. 18 (2) x 2
November 7, 2006	Milk	Blue bus	$7.00	s. 18 (1)* x 2

* Denotes an allegation that has not been particularized by date. The legal consequence of this omission is discussed in the Disposition of Appeal portion of this judgment.

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[29] In addition to the fourteen charges under the *H.P.P.A.*, three charges were laid under the *Milk Act*. The charge of operating an unlicensed milk plant, in which milk, cream or milk products were processed, contrary to s. 15 (1), remains the sole *Milk Act* charge in issue in this appeal. The Respondent was also charged with three counts of failing to comply with the 1994 Public Health Inspector's Order directing that he not store or display unpasteurized milk products contrary to s. 100 (1) of the *H.P.P.A.* Those allegations reference offence dates of October 20, October 27, and November 21, 2006.

[30] During the course of the trial, the Respondent acknowledged that he was not licensed under the *Milk Act* to operate a milk plant between August 17 - November 22, 2006.

(C) <u>The Case for the Defence</u>

[31] The Respondent was the main defence witness. The entirety of his trial testimony is reviewed in detail in Appendix "A" to this appeal judgment (See pp. 86-142,

January 28, 2009 Trial Transcript). A brief summary of the only other defence witness called at the trial, cow-share member Eric Bryant, is also summarized in Appendix "A" (See pp. 83-86, January 28, 2009 Trial Transcript).

[32] The significant aspects of the Respondent's trial testimony include the following:

- Previous involvement in facilitating the provision of raw milk to interested consumers in a "cow-lease" programme;
- The absence of any reported raw milk related illness as a consequence of the consumption of raw milk from Glencolton Farms;
- Subsequent prosecution, as a consequence of the programmes alleged non-compliance with the *H.P.P.A.* and *Milk Act*, a prosecution that concluded with the Respondent's guilty plea and the imposition of a $3500 fine;
- Acknowledged receipt of a 1994 "cease and desist" Order originally issued by a local health inspector and subsequently confirmed by the Health Protection Appeal Board;
- An assertion that the Order was of no continuing force and effect, as of 2006, as the Order referenced the previous geographical location of the Respondent's farm operation and not the address where the farm is presently situated;
- Representations regarding the cow-share programme and it's uneventful operation for a period of ten years (1996-2006) without regulatory intervention of any kind;
- The purported knowledge of local health officials, with regard to the programmes ongoing operation, as a result of the Respondent's high public visibility as a raw milk advocate;
- The Respondent's assertion that the Glencolton Farms dairy operation did not include a "plant", as that term is defined in the *Milk Act*, based, in part, on the fact the milk house was directly attached to the barn;
- An acknowledgment that the Respondent provided undercover operative Atherton with a small quantity of cheese, prior to her enrolment in the cow-share programme, based on her false representation in relation to the deteriorating state of her health;
- An assertion that the farm store cooler door was solid stainless steel effectively preventing the display of raw milk and milk products as alleged;

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- An outline of the steps taken to ensure the health of the Glencolton Farms dairy herd and the milk produced;
- An acknowledgement that the Respondent is not a cow-share programme member;
- An acknowledgement that raw milk and raw milk products were stored and displayed at Glencolton Farms on October 20, 2006 and at the farm and on the blue bus on November 21, 2006;
- The Respondent acknowledged that the member's handbook accurately outlined the details of the cow-share programme. No additional documentation, other than the handbook and membership card, reflected the "personal agreement" between Glencolton Farms and the cow-share membership;
- The Respondent acknowledged some uncertainty in the cow-share arrangement in regard to whether membership entitled the share-holder to a particular cow or access to a portion of the milk production; the Respondent stated "it could be both" with "the essential fact" being "that they (the cow-share members) actually have a cow".
- When confronted by the fact the name of a specific cow is not noted on the membership cards of any of the participants in the cow-share programme the Respondent advised of a "new" process where cow-share members are invited to the Respondent's barn in order to choose a cow;
- The Respondent testified that his responsibilities included the care and maintenance of the dairy herd and ensuring that they were properly fed and cleaned;
- The Respondent described himself as the "milkman" and agreed he performed different functions to facilitate the delivery of the raw milk to the cow-share members, including the bottling of the milk, the loading of the blue bus and the delivery of the milk and other farm products;
- The cow-share programme was indicated, by the Respondent, to be exempt from the prohibition against the sale of milk and milk products (s. 18(1) and 18(2) of the *H.P.P.A*) by creating a "private contract between two people to lawfully obtain a product not normally available to the public. The Respondent testified, "There are no regulations in place when you privately own your cow, which nobody can interfere with in the drinking of milk, as it comes from your cow".

5. <u>The Grounds of Appeal</u>

[33] In summary, the Appellant submits that the justice of the peace misapprehended

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the evidence at trial and misapplied the law to the evidence adduced in support of the various allegations. In addition, the Crown contends that the applicable burden, or onus of proof, has been misconsidered as a consequence of the justice's failure to properly interpret the applicable legislation in a broad, liberal and purposive fashion consistent with the public health safety objectives of both the *H.P.P.A.* and the *Milk Act*. Further, the Crown takes issue with the fact the Justice conducted his own research into the purported risks to health associated with human consumption of unpasteurized milk. The Appellant contends that the court then relied on the results of that independent research in reaching the conclusion that the available scientific evidence was effectively inconclusive on that issue. It is submitted that this out-of-court, independent inquiry affected procedural fairness and constituted a violation of natural justice, as neither Crown nor defence was able to respond to the results of the court's independent inquiries or even know what they were.

(A) <u>Misapprehension and Misapplication of Evidence</u>

[34] At the outset of his decision, the presiding justice indicated that he would not elaborate on the *viva voce* evidence offered by the Crown witnesses in light of the acknowledgments referred to in the Agreed Statement of Fact and the content of the defendant's statement to the investigators (para. 52). This concern is the basis for the detailed review of the entirety of the trial record in Appendix "A" of this judgment. The Appellant argues that the justice failed to give meaningful consideration to the evidence of the Crown witnesses', particularly the testimony of Ms. Atherton, where it conflicted with the Respondent's testimony.

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[35] With respect to the counts under s. 100(1) and ss. 18(1) (2) of the *H.P.P.A*, the Appellant asserts that the presiding justice of the peace erred in law by narrowing the issue to whether Ms. Atherton paid for the cheese before, and even after, she became a cow-share member. As a consequence, he is viewed as having misapprehended the core elements of the offences relating to producing, storing and distributing unpasteurized milk and milk products. The Appellant further contends that the court ignored the Respondent's express acknowledgements: that he was not licensed at any time under the *Milk Act*; that he continued to produce, store and distribute milk and milk products; and his acceptance of "the validity of" the Order to *cease manufacturing, processing, preparation, storage, handling, display [sale, offering for sale and distribution] of unpasteurized milk and milk products*, as delineated in the Agreed Statement of Facts and admitted by the Respondent during the trial (pp. 74-78, 98-100, 106-107, 172-108, 136-138, January 28, 2009 Trial Transcript). At paragraph 66, of the Reasons for Decision (January 22, 2009 Trial Transcript) the justice of the peace noted that cheese produced, stored and displayed by the Respondent was distributed to Ms. Atherton.

[36] During the course of a *de facto* collateral attack on the Health Protection Appeal Board Order, the Appellant also argues that the justice conflated or amalgamated the offence of selling unpasteurized milk product with the other culpable acts relating to the storing of unpasteurized milk. It is submitted that his focus on the form of the Respondent's operation and the legal significance attributed to the cow-share programme, as opposed to the Respondent's earlier cow-lease structure, effectively derailed consideration of the acknowledged statutory violations and the convictions that would

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necessarily have followed as a consequence.

[37] At paragraph 66 of his Reasons for Decision (January 22, 2010 Trial Transcript), the justice described the Respondent as being “emphatic” in his recollection that Ms. Atherton was not charged for the cheese. The Appellant points out that the Respondent’s own evidence was that he could not categorically say under oath that Ms. Atherton was not charged, but that his “usual practice” is to say “no, you can’t buy anything, [but] I can give you a piece to [...] to try out and let me know [but] you can always make a donation to the farm [...] (pp. 127-128, January 28, 2009 Trial Transcript). The issue of donation or gift of cheese, as an act of distribution of unpasteurized dairy product prohibited by the *H.P.P.A.*, was never considered. The Appellant contends, regardless of whether Ms. Atherton purchased the cheese, made a donation to Glencolton Farms, or was given the cheese for free, she was not eligible to receive the cheese lawfully. No recognized legal exemption authorizing this transaction is available to the Respondent. Section 4(3) of the *Provincial Offences Act* places the onus on the claimant to establish an exception, or exemption, from any licensing requirement, order or other concomitant legislation.

[38] The Crown also objects to the adoption of the credibility assessment of the Respondent arising from the 1994 Health Protection Appeal Board hearing. The Appellant submits that the justice of the peace erred in applying the positive findings the Appeal Board made about the Respondent’s credibility some 15 years earlier to buttress the credibility of the Respondent’s trial testimony (paras. 76-77, January 21, 2010 Trial Transcript). The Appellant submits that the justice attached undue weight to the

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reliability of the Respondent's assertions as to whether milk and milk products were being sold based, in part, on a credibility assessment made by unknown others, in an unrelated proceeding, held some 12 years earlier. The Appellant further contends that it is well-established that such determinations must be made on a case-by-case basis based on consideration of the actual record before the court: see e.g. *R. v. Ghorvei*, [1999] O.J. No. 3241 (C.A.).

[39] The Crown argues that this error was perpetuated by an apparent misapplication of the third branch of *R. v. W. (D.)*, [1991] 1 S.C.R. 742. The conflicting evidence of the investigator and the Respondent regarding Ms. Atherton's pre-cow-share membership receipt of two small quantities of cheese is reconciled by a credibility assessment that is resolved in the Respondent's favour without an explanation as to why Ms. Atherton's evidence was rejected and the Respondent's testimony concluded to be both credible and reliable. The stated preference for the evidence of the Respondent on the basis that "it strains common sense he would sabotage" his operation by selling the milk product, does not address the acknowledged fact that unpasteurized milk products were nonetheless being distributed, displayed, advertised and stored contrary to the *H.P.P.A.* and the *Milk Act* with the active participation of the Respondent. The Respondent's acknowledged lack of certainty in his own recollection of the sale versus gift, in relation to cheese received by Ms. Atherton, and the contended legal irrelevancy of the two accounts, given the express prohibition in the *H.P.P.A.* in relation to the distribution of raw milk, is submitted as undermining the basis for the justice's preference of the Respondent's trial testimony in relation to these transactions.

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(B) <u>Misapplication of the Burden of Proof</u>

[40] The Appellant submits that the trial court erroneously noted that the Respondent could avoid conviction by raising a defence available to him in the case of a strict liability offence, or by satisfying the court on a balance of probabilities that an authorization, exception, exemption or qualification "prescribed by law" operated in his favour, pursuant to s. 47(3) of the *Provincial Offences Act*. The Appellant contends that the Crown was not required, except by way of rebuttal, to prove that the exception did not operate in favour of the Respondent. The Respondent was required to prove the exception or exemption on a balance of probabilities: *Proulx v. Krukowski* (1993), 109 D.L.R. (4th) (Ont. C.A.) and *Halton (Regional Municipality) v. Stainton* (1991), 2 O.R. (3d) 170 (Prov. Div.).

[41] At trial, the Respondent offered no statutory or common law authority tending to show that he was not subject to the statutory requirements of the *H.P.P.A.* and *Milk Act*. No governing legislation or jurisprudence is viewed by the Appellant as an authorization, exception or exemption "prescribed by law" so as to exempt the Respondent from storing, distributing, delivering, or arguably, selling unpasteurized milk and milk products (para. 64, January 21, 2010 Trial Transcript). Moreover, no exemption is contended to exist in law to allow persons to contract out of the terms or provisions of either *Act* (See: *Kennedy v. Leeds, Grenville and Lanark District Health* [2009] O.J. No. 3957 (C.A.)*;* *Universal Game Farm Inc. et al v. Her Majesty the Queen in Right of Ontario* 86 O.R. (3d) 752 (S.C.J.). Given the regulatory purpose of the *H.P.P.A.* and *Milk Act* this prohibition is submitted as being consistent with the expressed purpose or intent of the

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Act from a policy perspective. By analogy, the Appellant notes there are any number of reported circumstances where a private agreement or privately conveyed consent has not acted as an impediment to prosecution: e.g. see *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Labaye*, [2005] 3 S.C.R. 728.

[42] Any of the individual acts of displaying, offering for sale, delivering, distributing or selling unpasteurized milk and milk products are submitted by the Appellant as being sufficient under the *H.P.P.A.* to warrant convictions under ss. 18(1) (2) and, by extension, 100(1). The Appellant further submits that the Respondent cannot benefit from the exemption under s. 18(3) because he was not licensed under the *Milk Act.* This fact was acknowledged by the trial justice (p.12, January 21, 2010 Trial Transcript). Therefore, the court is said to have erred by narrowing the issue as to whether the Respondent sold milk and milk products to paid-up cow-share members to determine culpability under *H.P.P.A.*, ss. 18(1) (2) and 100(1). The Respondent's own evidence regarding the ownership of the cows and the sale of their milk and the evidence relating to the storage and display of raw milk and other unpasteurized products is seen as sufficient to support convictions on all of the *H.P.P.A.* counts.

[43] The trial justice's consideration of the consequences of the conviction under the *H.P.P.A.* and *Milk Act* arising from the fact that the Respondent was concluded to have operated a "legitimate" enterprise is seen, by the Appellant, as reflecting a misunderstanding of the constituent elements of the offences in dispute. In any prosecution, the issue is whether the Crown has met the burden of proof of the charge beyond a reasonable doubt. The fact that members of the cow-share programme

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voluntarily assumed any health risks associated with the consumption of unpasteurized milk does not and cannot operate as a defence or exempt Mr. Schmidt's distribution arrangement from the restrictions inherent in the *H.P.P.A.* and *Milk Act*.

[44] Whether or not the consumers of the raw milk and raw milk products are actually harmed is not an essential element that the Crown is required to establish, nor is it determinative of guilt or innocence. None of the provisions in issue in this matter have causation requirements. The legislative provisions and the 1994 Order simply proscribe the acts of storing, displaying, delivering, distributing and selling unpasteurized milk and milk products.

[45] The Appellant acknowledges that there was no evidence that the raw milk produced by the cows at Glencolton Farm was a "health hazard" other than that it was "raw" or unpasteurized. The consequent sale or distribution of the milk is therefore proscribed by law. The 1994 finding of the Health Services Appeal and Review Board that raw milk is a "health hazard" was included in the Agreed Statement of Facts. Why the Order was made is viewed as irrelevant to the issues at trial and it is submitted as being outside the trial justice's jurisdiction to review. The testimony of the expert witness called by the Crown at trial is submitted as offering confirmatory support for the Review Board conclusion, as to the relative safety of raw milk, from a public health perspective.

[46] Public Health Inspectors, Andrew Barton and Christopher Munn, testified that raw milk and raw milk products are deemed a health hazard pursuant to government guidelines. The trial justice noted, at paragraph 158 (January 21, 2010 Trial Transcript) that, "it is essential to note that [...] the tests conducted by the Public Health Officials on

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the seized (dairy) products revealed [...] that the milk had not been pasteurized, which in and of itself, is deemed to be a risk to public health by virtue of the provisions of the *H.P.P.A.*" Further, Mr. Munn testified, as noted previously, that M.N.R. Investigator Campbell contacted him in September 2006 about an E-Coli outbreak that the Respondent might be connected to by virtue of the fact raw milk was suspected as being the source of infection (p. 43-44, January 28, 2009 Trial Transcript).

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(C) Issues of Procedural Fairness and Natural Justice

[47] The Appellant contends the court committed reversible error in this respect. Specifically, the trial justice cited "Sullivan and Driedger on the Construction of Statutes" Butterworths Canada Ltd., 2002 (4th Edition) and "Sullivan on the Construction of Statutes", Lexis Nexis Canada Inc., 2008 (5th Edition) as authority to justify the fact he conducted his own research in concluding "similar cow-share programmes are functioning lawfully in large parts of the world, including many states in the United States of America and Australia [...] British Columbia, Nova Scotia and even in Ontario [...] some countries, such as Great Britain, Germany, Finland, Sweden and New Zealand [permit farmers] to sell their raw milk directly from the farm to the consumers" (paras. 168-169, January 21, 2010 Trial Transcript). From this, the justice surmised, without identifying the source of the information he was relying on, that the proponents of these arrangements "stress that any food whatsoever can be contaminated so that food safety in general boils down to how it was produced, handled and packaged." The Appellant submits that this inappropriate independent research likely contributed to the formulation of the justice's conclusion that the Respondent's raw milk enterprise did not violate either

s. 18(1) or 18 (2) of the *H.P.P.A.*

[48] In *R. v. Hamilton*, [2004] O.J. No. 3252 (C.A.), a case in which the topic of independent judicial research was discussed at some length, the Ontario Court of Appeal reversed the trial judge's sentence after it was determined to be unfit. In formulating sentence the trial judge used voluminous raw statistical information he had acquired without the assistance of a properly qualified witness or the receipt of evidence on the point and submissions by either party. From the statistical evidence he put together, the trial judge made certain factual conclusions about the circumstances of the accused. This information formed the basis of the justice's decision that the accused's involvement in the offence of importing cocaine could be understood as an aspect of the systemic, social and racial bias against poor black women. The court then used that research, at least in part, as a basis to hold that such bias justified the imposition of conditional sentences. The Court of Appeal concluded that this was a reversible error, absent any evidence or submissions to support the conclusions reached by the justice. Ultimately, the reviewing court concluded, "the trial judge effectively took over [the proceedings], and in doing so went beyond the role assigned to a trial judge in such proceedings. It became an inquiry by the trial judge into much broader and more complex issues [than the issues to be determined by the court]" (para. 3).

[49] At paragraph 71 of the *Hamilton* decision, the Court of Appeal held that the manner that the proceedings were conducted and the approach of the trial judge created three overarching problems that may be viewed as having application in the instant case:

(1) by assuming the multi-faceted role of advocate, witness and judge, the

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trial judge put the appearance of impartiality at risk, if not actually comprising that appearance;

(2) it produced a fundamental disconnect between the case presented by counsel and the case constructed by the trial judge; and

(3) it created a real risk of inaccurate fact-finding by introducing raw statistical information and forms of opinion on a wide variety of topics. None of this material was analyzed or tested in any way.

(D) <u>The Primary Issue</u>

[50] In large measure this appeal turns on the legitimacy of the Respondent's cow-share programme and consideration of issues of statutory interpretation. The justice of the peace concluded the cow-share programme was a lawful way for unpasteurized milk to be distributed to the "legal" owners of the cows that produced the milk in compliance with both the *Milk Act* and *H.P.P.A.* The Appellant submits the cow-share programme constitutes an unlawful attempt to circumvent the clear intention of the legislation to limit the consumption of unpasteurized milk to a restricted group, implicitly limited by statute, the producers of the milk and members of their immediate family.

6. <u>The Cow-Share Programme</u>

[51] A review of the trial record, the Statement of Agreed Facts and the trial exhibits confirms the Respondent's intention to create a share arrangement where interested whole milk consumers could gain a legal interest in a portion of the milk products generated by the Glencolton Farm dairy cattle. Although some uncertainty exists in the trial record as to whether the price paid by the consumer was for a specific cow within the herd or access to a portion of the milk production of a particular cow, the fact there were 150 cow-share members and only 24 cows suggests the agreement permitted access to the milk itself. This conclusion is confirmed at page nine of the publication "The Glencolton

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Farm Cow-Share Members' Handbook" which every cow-share member received along with a milk share certificate. The price to purchase a single share was three hundred dollars or approximately one quarter of the price of a dairy cow. No formal contract of purchase and sale was executed by either vendor or purchaser. No corporate structure was created allowing the interested consumer to receive an actual share certificate as an equity owner in the corporation that included the herd as one of its assets. It appears that legal title to the cows remained with the Respondent as the owner of Glencolton Farm. Although the trial record serves to confirm that the Respondent viewed the dairy herd as being owned by the various cow-share certificate holders, in reality, the cow-share arrangement approximates membership in a "big box" store that requires a fee to be paid in order to gain access to the products located therein. There is no evidence the cow-share holders were involved in the purchase of the cows in the herd, their subsequent sale or replacement, or that they had any say in the management of the herd or the distribution of the resultant milk product. The membership handbook indicates that the cow-share members fund the services of the Respondent and his wife to tend the cows and look after the milk production. The members are directed to pick up the milk at the farm or from the blue bus with one cow-share indicated as entitling the share holder to a yearly total of approximately 750 litres of unpasteurized milk, cheese, cream or other dairy products.

(A) <u>The Crown's View of the Cow-Share Programme</u>

[52] On behalf of the Ministry of Natural Resources, Mr. Ryan submits the following factors constitute legal deficiencies in what the Appellant views as an illegal distribution scheme within the context of the applicable provisions of the *H.P.P.A.*:

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- the absence of any evidence of a legally valid and enforceable transfer of title to the cow-share member of a specific asset, i.e. a cow or a quantified interest in a cow or the herd itself;
- the absence of a written contract, agreement of purchase and sale or any title documents to offer legal confirmation of the purported legal transfer of a tangible ownership interest in the herd or a particular cow;
- the absence of any particularized accounting records to report milk sales as distinct from the sales of any other products;
- the fact the undercover operative was permitted to buy milk, on more than one occasion after becoming a cow-share member, without first producing her cow-share membership card is contended to undermine the significance of the membership card in the cow-share programme distribution scheme and the legitimacy of the cow-share arrangement as a lawful way to effect compliance with s. 18(2) of the *H.P.P.A.*;
- the absence of any discussion regarding equity ownership of the herd or the milk production of the herd at the time the undercover operative, Ms. Atherton, purchased a three hundred dollar cow-share certificate which was indicated as a required prerequisite before the milk produced by the Glencolton Farm cows could be purchased; and,
- the fact the transfer of legal ownership of the milk production or cows to the cow-share members, even if confirmed by a valid legal contract and/or shareholder agreement, cannot circumvent the statutory prohibition against distribution embodied in s. 18(1) and s. 18(2) of the *H.P.P.A.*

[53] A valid transfer of ownership or the conferring of an equity interest in the cows or in the herd or the milk they produce is conceded by the Crown as potentially negating the alleged violation of s. 18(1) and its prohibition against the sale of unpasteurized milk. The initial money paid by the cow-share member could then be viewed as payable in consideration of an ownership interest in the cow. The money subsequently paid for the product would then be in consideration of the Respondent's labour as herdsman. If those circumstances were concluded to exist the Appellant contends the s. 18(1) distribution offence would continue to remain viable.

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[54] Mr. Ryan acknowledges cow-share programmes have been legally recognized in other jurisdictions. Those arrangements are indicated as featuring written sales documentation confirming the actual purchase and sale of a cow, legal contracts, binding agreements, a designated and confirmed legal interest in a particular cow and/or a matching of a particular owner to the ownership and milk production of a particular herd. The sharing of milk or milk products that legally belong to others, by gift, sale or otherwise, is viewed by the Appellant as transgressing the distribution prohibition found in both s. 18 (1) and s. 18(2).

(B) <u>Assessment of the Cow-Share Programme at Trial</u>

[55] The presiding justice of the peace concluded the Respondent's cow-share programme was a "legitimate private enterprise" with cow-share membership cards and the related booklet furnished exclusively to signed-up members. The purchase of unpasteurized milk products was found to be restricted to the cow-share membership with the membership fees paid reflecting an ownership in the herd's cows for the balance of the cow's milking life (pp. 35-36, paras. 143-145, January 21, 2010, Trial Transcript).

[56] At trial, the members of the cow-share programme were concluded to be fully informed as to the nature of the products they gained access to consume and the methods by which these products had been produced. This led the justice of the peace to conclude at paragraph 145 of his judgment as follows:

> Those findings support the existence of a valid private agreement between the defendant and cow-share members in terms of which he is responsible for the upkeep of the cows and the provision of milk for membership. The responsibility of the members is to pay a fee for the upkeep of the cows, the production of the dairy products and their delivery.

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[57] At paragraph 158 the following considerations are referenced:

- cow-share members are fully informed of the fact the milk produced at Glencolton Farm is unpasteurized with the cow-share members booklet clearly delineating the respective duties and responsibilities of the Respondent and the cow-share members;
- the issuance of cow-share membership cards in the name of the subscribing member;
- the initial payment of a capital amount "relative" to the anticipated milking life of a cow;
- the fact the resultant milk and milk products are knowingly consumed by the cow-share members at their own risk; and
- the absence of any evidence that anyone has become ill as a consequence of consuming milk or milk products from the Glencolton Farm's herd.

[58] After conducting his own independent research the justice noted similar cow-share programmes function lawfully in various jurisdictions throughout North America. Reference was made to the fact raw milk can be sold directly to consumers, by the farmer who produces it, in a number of countries such as Germany, Finland, Sweden and New Zealand. Based, at least in part, on consideration of these factors the Justice of the Peace concluded the Respondent's "raw milk enterprise" was not in violation of either s. 18(1) or 18(2) of the *H.P.P.A.*

[59] On concluding the cow-share programme constitutes a "sharing of ownership of the cows amongst the members" no violation of the Public Health Inspector's 1994 "cease and desist" Order was found to have occurred, on the three dates alleged, as a consequence of the Respondent's role in storing or displaying unpasteurized milk and milk products. While the restraining Order was acknowledged to be valid, the distribution arrangement through the cow-share membership was concluded <u>not</u> to constitute a violation of the prohibited activities referenced in the Order itself "with

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respect to the public at large." (para. 175, January 21, 2010 Trial Transcript).

[60] Additionally at page 43, paragraph 181, of the Reasons for Judgment, the justice concludes:

> While all of the products grown and produced by the defendant are available for sale to every member of the public who is prepared to pay the price, the milk and milk products are reserved for sale and distribution only to specific members of the public, namely those who are knowledgeable (not vulnerable), paid-up and properly informed members of the cow-share programme especially created by the defendant so as to make these products available for certain members of the public who wish to obtain them. By so doing, the defendant maintains that he has done everything reasonable to achieve that purpose while remaining within the confines and the spirit of the legislation. I agree.

(C) Does the Glencolton Farms Cow-Share Programme Contravene s. 18(1) and s. 18(2) of the *H.P.P.A.*?

[61] In answering this question, the decision of the presiding justice of the peace, regarding the matter of statutory interpretation, is instructive.

[62] At paragraphs 94-96 (January 21, 2010 Trial Transcript) the trial justice indicates that if he "were to adopt the ordinary meaning of the various pieces of legislation under consideration, at first blush it would appear that the defendant should be found guilty on all counts." No further elaboration or expanded rationale was offered in justification of this conclusionary statement. Thereafter, the justice of the peace proceeded to analyze the provisions in the *H.P.P.A.* and *Milk Act* in a contextual fashion. The "general terms" in which the *Acts* were drafted were determined to require a restrictive statutory interpretation that took into account "the history of the case and defendant's years of involvement with the justice system". The language in the *H.P.P.A.*

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and the *Milk Act* was considered "general" and requiring restrictive interpretation. No common law authority on point was referenced.

[63] Also critical to the trial justice's analysis and his ultimate determination that the offence provisions do not apply to the Respondent's operation was his conclusion that the complexity of the proceeding made it a "hard case" where legislative intent was unclear and ambiguous. Consequently, he found that "departure from according the ordinary meaning" of the statutes provisions was warranted (paras. 98 and 100, January 21, 2010 Trial Transcript). The rationale for concluding why the purpose of the *H.P.P.A.* and *Milk Act* was unclear or uncertain was not addressed in the judgement.

[64] In the Reasons for Judgment the purpose of the applicable legislation is concluded to be delivery of public health programmes and the prevention of the spread of disease, with the object of protecting the health of the people of Ontario (para. 124, January 21, 2010 Trial Transcript). The Appellant takes the position that the *H.P.P.A.* and *Milk Act* are public welfare statutes designed to promote public health and safety. As such, they should be broadly interpreted in a manner consistent with that purpose and the objective of the legislative scheme pursuant to *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.). The Appellant contends the trial justice failed to justify his restrictive interpretation of the provisions of the *H.P.P.A.* and *Milk Act* and his departure from assigning the ordinary meaning of "sell", "distribute", "distributor" and "marketing" to those terms, as they are referenced in the applicable legislation.

[65] Furthermore, the Appellant asserts the justice erred in considering the Respondent's history with the justice system and the fact he would face "astronomical

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fines" if convicted on all counts as relevant factors in concluding that the offence provisions did not apply to the Respondent's "private" distribution scheme. No factual analysis or cited legal authority is relied upon in support of the proposition that, in the face of legislative provisions to the contrary, it was not the Legislature's intent to penalize where culpability is established to exist.

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Conclusion

[66] The foregoing analysis confirms reversible errors exist in law in the rationale relied on by the justice of the peace in acquitting the Respondent of the ss. 18(1) and s. 18(2) *H.P.P.A.* charges and the sole remaining charge (operating a milk plant without a licence) under s. 15(1) of the *Milk Act*. The applicable legislation was not given the broad interpretation it required as public welfare legislation. Appropriate consideration was also not afforded to the restrictions inherent in the *Act* according to their plain meaning. The interpretation of the reviewed legislative provisions consistent with the language of the sections in issue, the context in which the language is used and the expressed purpose of the legislation itself was required: See *Blue Star Trailer Rentals Inc*., and *407 E.T.R. Concession Co*. (2008), 91 O.R. (3rd) (C.A.) at para. 23. An interpretation consistent with the legislative aim of both the *Milk Act* and *H.P.P.A.* should have been adopted and not, as here, interpretations "that defeat or undermine legislative purpose": See *Her Majesty the Queen in Right of Ontario (Ministry of Labour) v. United Independent Operators*, 20411 104 O.R. (3d), (C.A.) per Gillese J.A. at paragraphs 31 and 32. Had the applicable legislation been more broadly interpreted in the instant case, as required by law, the Respondent would necessarily have been found guilty of each of

the offences alleged with the possible exception of two s.18 (2) sale allegations (August 22, 2006 and October 17, 2006) on the basis of the evidence presented at trial. Only those two acquittals and the acquittals relating to the *H.P.P.A.* s. 100 (1) offences regarding breaches of the 1994 public health inspector's cease and desist" Order are concluded as sustainable.

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7. Failure to Obey the February 17, 1994 Order s. 100(1) *H.P.P.A.* of the Public Health Inspector

[67] The charge of failing to comply with the twelve-year-old Order of the Public Health Inspector by storing and displaying unpasteurized milk and milk products on three separate occasions (October 20, 27 and November 21, 2006) is substantiated factually on the basis of the trial record for the reasons that have been previously enunciated in this appeal judgment. At trial the Respondent asserted that he believed the restriction in the Order applied to a specific location "LCT 38.39.40 Concession 2 EGR Glenelg Township, Grey County, Ontario" and not to the 2006 site of Glencolton Farms, namely Lot 44. This belief gives rise to consideration of the defence of honest but mistaken belief in facts that if true would render his acts innocent on proof that the Respondent exercised all reasonable care to avoid committing the offences. In my view, the fact that no enforcement action was taken by the authorities to enforce the Public Health Inspector's 1994 "cease and desist" Order for some twelve years after it had been originally issued, even though the Respondent's cow-share programme had been in active and known operation for approximately ten of those years following the Orders issuance, lends an air of reality to the Respondent's mistaken belief regarding the intent and scope of the 1994 Order. I conclude the trial record supports the defence of honest but mistaken

belief in relation to the three s. 100(1) charges with that belief being supported by the prosecutorial inertia in even alerting the Respondent to the regulatory authorities concerns. The acquittals on these three charges are therefore affirmed.

[68] As a consequence of the absence of any action by the Crown to enforce the terms of the Order it would not be unreasonable for the Respondent to conclude the Order referred to place rather than person. Similarly, the absence of any form of enforcement initiative under s. 18(1) or (2) of the *H.P.P.A.* or s. 15(1) or (2) of the *Milk Act* over a period of almost a decade might serve to reasonably affirm in the Respondent's mind that his cow-share programme was viewed by the authorities as being in compliance with the legislation.

[69] On consideration of the trial record these misconceptions are viewed as being honestly held and a reasonable basis to conclude that the Respondent exercised reasonable care (the long-standing, officially unchallenged, cow-share programme instituted at a different location than that specifically referenced in the 1994 Order) to comply with the Order. The content of the Order itself may have served to contribute to the Respondent's misunderstanding that it related to "place" rather than "person". While the Order denotes the Respondent by name it also specifies him as being the operator of Glencolton Farms at a defined location. Had the Order referenced the Respondent by name only, any purported ambiguity would be removed and the defence of honest but mistaken belief for this strict liability offence would not be available. Considered collectively, the delay in any form of enforcement action by the authorities subsequent to the issuance of the Order, in the face of the Respondent's known participation in the cow-

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share programme involving the distribution of raw milk and raw milk products over an extended period of time, and in the face of the inherent ambiguity in the Order itself, persuades me that the acquittal on the three s. 100(1) charges ought to be affirmed, albeit for different reasons than those enunciated by the trial Justice. It cannot be concluded in these circumstances that the Order was sufficiently clear and unequivocal, or the breach deliberate or intentional, in view of the apparent tacit acceptance of its existence by all interested government agencies over such a long period of time (See *Laroche* (1964), 43 C.R. 228 (S.C.C.); (1963), 40 C.R. 144 (Ont. C.A.) and *R. v. Roche* (1985), 46 C.R. (3d) 160, (Ont. C.A.) (1984), 40 C.R. (3d) 138 Co. Ct.*); Prescott - Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.)

8. <u>Entrapment</u>

[70] The potential applicability of the defence of entrapment was raised by Respondent's counsel, Ms. Selick, on appeal. Having reviewed the trial record in relation to the actions of the undercover operative, Ms. Atherton in her efforts to receive raw milk or raw milk product, I conclude a factual basis does not exist to advance such a defence. The use of a false identity by the undercover operative, prevailing on the Respondent's sensibilities with a concocted, compelling, personal medical history, and the assorted false representations that followed the initial encounter between the Respondent and the undercover operative do not amount to circumstances constituting "the clearest of cases" where the administration of justice would be brought into disrepute if the finding of guilt were to stand (*R. v. Mack* (1988), 67 C.R. (3d) 1 S.C.C.

[71] Entrapment occurs when the authorities provide a person with an opportunity to

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commit an offence absent the reasonable suspicion that the person is already committing an offence or without making any bona fide inquiry to confirm that a prohibited activity is already taking place. On the facts here, in relation to the initial interaction between the Respondent and the undercover operative, the trial record clearly establishes the authorities had a reasonable basis to suspect raw milk products were being supplied by the Respondent, to others, long before Ms. Atherton arrived on the scene in an undercover capacity. The investigators were acting during the course of a "*bona fide*" inquiry and simply provided a further opportunity for unpasteurized milk product to be conveyed by the Respondent. The Respondent's own acknowledgment at trial of the conversations in which he recalls agreeing to give unpasteurized milk product to Ms. Atherton undermine the viability of an entrapment assertion based on an allegation of some form of official inducement influencing the Respondent's decision to convey the offending product.

9. <u>The Charter Issues</u>

[72] In a ruling dated December 17, 2010, directions were provided to counsel regarding the scope of the *Charter* issues that would be permitted to be submitted in this appeal. Some expansion of the *Charter* issues raised or alluded to at trial were authorized, as these issues were determined to have been previously identified, but not formalized, by the Respondent. As the Respondent was not represented at trial and the *Charter* concerns advanced at his trial had not been adjudicated, several collateral grounds were permitted to be heard. Accordingly, in due course, two cow-share members were deposed on their affidavits which primarily relate to matters of personal health and

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religious practice involving the consumption of raw milk and raw milk products.

[73] By application, the Respondent challenges the prohibition on the sale and distribution of raw milk as referenced in both the *H.P.P.A.* and the *Milk Act*. *Charter* issues were advanced under ss. 7 of the *Canadian Charter of Rights and Freedoms*, which embodies the right not to be deprived of life, liberty or security of person except in accordance with the principles of fundamental justice, ss. 2(a), which enshrines the lawful entitlement to freedom of religion and s. 15, the right to equality.

[74] The Appellant submits there is no merit to any of the *Charter* claims. In support of this contention the Attorney General submits both the *H.P.P.A.* and the *Milk Act* are directed, at least in part, to the regulation of the safety and quality of milk products in Ontario. The *H.P.P.A.* has as its broader objective the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario. The *Milk Act* also contains legislated directives governing all aspects of the production and marketing of milk and milk products in the province.

(A) Expert Evidence Regarding the Relative Health Risks Associated with Human Consumption of Unpasteurized Milk

[75] Four expert witnesses testified during the course of the trial, two for each of the prosecution and defence, on the issue of whether or not the consumption of unpasteurized milk and milk products constitutes a risk to public health. The court heard from Dr. Griffiths, a dairy microbiologist and professor in the Department of Food Science at the University of Guelph, Dr. Wilson, an Associate Professor in the Department of Medicine at the University of Guelph, Dr. Beals, a pathologist and Dr. Ronald Hull, a dairy

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microbiologist.

[76] The Crown experts, Drs. Griffiths and Wilson, testified that human consumption of raw milk and raw milk food products constitute a significant risk to health as raw milk is a known source of food borne illnesses. The elderly, pregnant women and others with compromised immune systems were noted as being particularly vulnerable to the various virulent bacteria, pathogens or infectious agents, with the potential to cause human disease that are often found in unpasteurized milk. The pathogens were noted to include salmonella, E. coli 157, Listeria, Verotoxigenic E. coli and campylobacter.

[77] The process of pasteurization, which in Canada involves heating the milk to seventy-two degrees centigrade for a period of sixteen seconds, was indicated by Dr. Griffiths as a process that eliminates most of the pathogens from milk while retaining most of the nutritional characteristics of the milk. The process was indicated as being an effective way to reduce, but not eliminate, the risk of milk borne illness. Raw milk related illnesses were noted as occasionally manifesting in an asymptomatic fashion through transmission by an unaffected carrier to others with whom the carrier has subsequent contact. In those circumstances, the carrier of the milk borne infection displays no symptoms but may infect others who subsequently become ill.

[78] The defence experts, Dr. Beals and Dr. Hull, noted the history of the commercialization of the milk distribution system in the early part of the 1900’s as people moved from the country to the city and the subsequent development of large-scale dairy farms. The advent of pasteurization as an aspect of the commercialization of milk and milk products was also discussed by Dr. Beals. He asserted the process reduces the

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enzyme count in milk and effectively eliminates the presence of beneficial bacteria in the milk. Dr. Beals also drew a distinction between the relative health safety, of what the Respondent refers to as "farm fresh milk", or raw milk produced for the purpose of human consumption, as opposed to raw milk produced for commercial purposes and destined to be pasteurized. Dr. Beals testified that there is scientific support for the contention that good animal husbandry practices, farm cleanliness, appropriate pasturing and diet, and safe milk handling procedures can reduce the health related risks associated with the consumption of unpasteurized milk to a safe level.

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(B) <u>Section 7 – Security of Person</u>

[79] James McLaren and Eric Bryant provided affidavits in which they expressed the positive impact that the consumption of raw milk and raw milk products has had on the state of their health. Mr. Bryant also asserted that the consumption of raw milk formed an essential part of his religious practices as a vegan and a follower of the dieting guidelines as delineated in "The Essene Gospel of Peace". The restrictions inherit in the existing legislation are contended to violate Mr. Bryant's s. 2 (a) entitlement to freedom of religion by arbitrarily interfering with and restricting an aspect of his religious practice.

[80] In order to advance the s. 7 *Charter* challenge the law requires that the applicant establish that the state has deprived him or her of life, liberty or security of person (*R. v. Beare*, [1988] 2 S.C.R. 387 at para. 28; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 47 and *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486 at para. 30.

[81] In order for this challenge to be considered, as the claim is not that the Respondent's own rights have been violated but those of others, the Respondent must establish the following:

> 1) that there is a serious issue as to the validity of either the *H.P.P.A.* or the *Milk Act*;
>
> 2) that he is directly affected by these *Acts* or has a genuine interest in its validity; and,
>
> 3) that that there is no other reasonable and or effective way to bring the validity of the Acts in issue before the court (*R. v. Hy and Zel's Inc. v. Ontario (Attorney General*); *Paul Magder Furs Ltd. v. Ontario (Attorney General),* [1993] 3 S.C.R. 675 at para. 30).

[82] Having reviewed and considered the applicable authorities and counsel's written and oral submissions on this challenge, I conclude that the Respondent has failed to establish a breach of his own liberty interest. He therefore has no legal standing to advance a claim on behalf of either Mr. McLaren or Mr. Bryant. As noted, the Respondent faces a monetary penalty on conviction for the offences alleged. The prospect of a jail term arising in this matter is exceedingly remote. The Respondent would have to default on payment of the levied fine(s) and fail to comply with any of the remedial payment arrangements that are mandated by the *Provincial Offences Act* on default of payment of the fine. It is only after all other alternatives have been exhausted that a period of incarceration may be contemplated. Although imprisonment is a potential, albeit remote, consequence of conviction, that sanction must be weighed against the risk to public safety the legislation was intended to address and the need for restrictions on the distribution of raw milk in the *H.P.P.A.* On balance it cannot be concluded that the penalty provisions of the *Provincial Offences Act*, applicable here, act to potentially deprive the Respondent of life, liberty or security of person.

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[83] Even if one were to accept the testimony proffered in support of the purported health benefits Mr. Bryant and Mr. McLaren associated with the consumption of raw milk, the right of these individuals to consume raw milk is not prohibited by law. Given the expressed restriction on the sale and distribution of raw milk and raw milk products in s. 18(1) and (2) of the *H.P.P.A.* the Respondent could not acquire a right to sell or distribute raw milk simply because others establish a right to acquire it. See: *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at paras. 85 - 86; *R. v. Parker*, (2000), 49 O.R. (3d) 481, at paras. 92-97 and 102-111.

[84] It is open to the consumers of raw milk to mount their own challenge to the constitutionality of the legislation in the event they find they are unable to secure raw milk and to show that it is fundamental to their life, liberty or security of person in support of a request to be exempted from the existing legislation. Those similarly affected by the *H.P.P.A.* or *Milk Act*, including those non-farm based consumers of raw milk, can also seek a constitutional exemption which, if successful, would in all likelihood, result in access to raw milk being accorded. Although the Respondent has a genuine interest in the validity of the *Acts*, other alternative “reasonable” and “effective” ways exist for individual cow-share members to bring the validity of the *Acts* in issue before the court by seeking an individual constitutional exemption to the existing restraints on access to raw milk the law currently creates.

[85] It is acknowledged that in general terms an individual has the right to make decisions regarding their own bodily integrity and personal health, as recognized by La Forest J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at

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paragraph 36. However, it does not logically follow that the right to security of the person of raw milk consumers will necessarily be infringed if the Respondent's cow-share arrangement is found to be illegal. The preponderance of scientific evidence cited offers factual support for the assertion that human consumption of raw milk may be hazardous to one's health or at least more hazardous than the health risk presented by the consumption of pasteurized milk. The wide interest in this litigation serves to confirm this assessment is not universally held and there are many residents of Ontario who have consumed a life-times worth of raw milk and raw milk products without any ill effects. On the basis of the expert evidence provided at trial it cannot however be concluded, in my view, that the resultant legislative restriction on the sale and distribution of raw milk is either arbitrary or overly broad.

[86] I accept the Respondent's submission regarding the apparent internal inconsistency in the Attorney General's argument that on the one hand raw milk is asserted to be potentially hazardous to one's health to the extent its sale and distribution are banned but apparently not so hazardous as to warrant the restriction of the relatively unrestrained right to consume the product, provided one has an ownership interest in a dairy cow.

[87] This particular legislation may also fairly be viewed as internally inconsistent from the perspective of its response to the serious public health concerns expressed by the expert witnesses who testified on behalf of the Crown during the course of the constitutional argument. The conclusions they reached largely reflect those found in the 1994 report of the Ministry of Health's – Health Services Review Board. In that report a

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Board qualified expert, Dr. Styliardis, concluded, in an opinion that the Board accepted, "that unpasteurized milk and milk products constitute a health hazard as defined by the *H.P.P.A.* because they are vehicles for the transmission of a number of different harmful bacteria including bovine tuberculosis, brucellosis, staphylococcus, bacilli, shigella, chloroforms, and E-coli."

[88] Dr. Styliardis opined that all of these bacteria were "capable of causing harmful diseases in human beings and that all these diseases had the potential to be life-threatening in the right set of circumstances" with young children, the elderly, pregnant women and the immunity compromised individual as being at greatest risk.

[89] These concerns might suggest an even broader restriction on the consumption of unpasteurized milk and milk products could be justified from a public health perspective. The fact the legislation prohibits the sale and distribution of raw milk and effectively controls the hitherto lawful entitlement to consume raw milk does not however render the law arbitrary. The authorities direct that it is a matter for the legislature to delineate the parameters or define the scope of the regulatory scheme relating to the consumption, distribution and sale of raw milk and raw milk products, provided there is a sufficient body of scientific evidence to give rise to a "reasoned apprehension of harm to permit the legislature to act."

[90] On consideration of the totality of the evidence presented at the Respondent's trial it is difficult to contend that a "reasonable apprehension of harm" to public health, arising from the serious potential health consequences of consuming raw milk, has not been established. While issue may be taken, depending on one's perspective, to the

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underwhelming or, alternatively, over-reaching, response by the legislature to this issue, it is clear that the courts must accord deference to those who have been elected to enact such rules and regulations.

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[91] The rationale for this separation of authority is recognized by the Supreme Court of Canada in *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, a case involving consideration of the criminalization of simple possession of marihuana. At paragraph 133, the Court addresses the issue of deference to the legislature:

> Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or in the words of Braidwood J.A., the harm is "not [in] significant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job. Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do. A "serious and substantial" standard of review would involve the courts in micromanagement of Parliament's agenda. The relevant constitutional control is not micromanagement but the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected, as will be discussed.
>
> 134 Having said that, our understanding of the view taken of the facts by the courts below is that while the risk of harm to the great majority of users can be characterized at the lower level of "neither trivial nor insignificant", the risk of harm to members of the vulnerable groups reaches the higher level of "serious and substantial". This distinction simply underlines the difficulties of a court attempting to quantify "harm" beyond a *de minimum* standard.

[92] The evidence presented at trial indicates there are a number of jurisdictions that authorize the consumption, distribution and sale of raw milk and raw milk products, with minimal restrictions, including Germany, New Zealand, England, Wales, Australia and numerous States in the United States of America.

[93] The fact that these jurisdictions have taken a different approach in assessing the relative health risks potentially presented by human consumption of raw milk cannot be

relied upon to impugn the approach to the issue taken by the Legislature in Ontario. The Legislature is entitled to deference in its formulation of laws to best address the identified public health concern.

[94] Similarly, the fact expert evidence presented at trial suggests the consumption of raw milk has positive effects on the immune system and provides a source of lactic acid bacteria that helps balance the potential harmful effects of numerous pathogenic organisms are factors that should be considered by the Legislature in formulating public health policy on this issue. The evidence at trial establishes, at the very least, a reasoned and sufficiently verified apprehension of potential harm to health as a consequence of the consumption of raw milk. Provided the legislative initiative is not arbitrary, or without a reasonable scientific foundation, it is a matter for the Legislature of each jurisdiction where milk is consumed to determine whether pasteurization will be mandated or not.

[95] In *Cochrane v. Ontario (Attorney General)*, [2008] 92 O.R. (3d) 321 (C.A.) at paragraphs 26-30, a challenge to the law banning pit bull dogs, Justice Sharpe for the Court, discussed the interpretation of the phrase “reasoned apprehension of harm” and the court’s role in assessing the legislated response to the interest to be protected. Specifically, even in areas where legislation may be based on a disputed scientific foundation, as the trial justice found existed in the present appeal, or in the area of social science, deference has been consistently demonstrated by the courts to legislative judgment in circumstances where “...there was sufficient evidence of a reasoned apprehension of harm to permit the legislation to act” (para. 29).

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i) <u>Law Not Grossly Disproportionate</u>

[96] The entitlement to consume milk, raw or otherwise, is not a *Charter* protected right. Accordingly, the Respondent bears the obligation of establishing that the restrictions on raw milk consumption and the prohibition of its sale and distribution is "grossly disproportionate" to the legislative objective inherent in the applicable provisions of the *Milk Act* and the *H.P.P.A.* This assessment involves consideration of the extent of the alleged *Charter* infringement, if any, and its significance when contrasted with the interest, or objective, the legislative initiative was enacted to address.

[97] By analogy, Justice Sharpe's comments in *Cochrane v. Ontario (Attorney General)* resonate in this appeal. It is the "reasonable apprehension of harm" and not evidence of actual harm that must be considered in assessing the legislative response to the public health or safety issue the law was enacted to protect. As Ms. Selick rightly points out, there was no evidence presented at trial to suggest that the milk produced at Glencolton Farm was unhealthy to consume. There is no evidence, other than anecdotal speculation, that anyone ever became ill after drinking unpasteurized milk produced by the cows on the Respondent's farm. As the *H.P.P.A.* implicitly authorizes a "farm family" exemption to permit a relatively unfettered entitlement to the dairy producers of Ontario to drink the raw milk they produce, one might reasonably expect to see regular outbreaks of raw milk related illness if the product was as dangerous to one's health as the Appellant asserts. Further, assuming that the dairy farmers of Ontario and their families consume raw milk, and presumably many do, one might also expect to see regular outbreaks of raw milk related illness in rural populations in which the dairy farms are

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located as a consequence of the fact the consumers of such milk may be asymptomatic carriers of milk based bacteria or pathogens that may cause infection in others. Consideration of these factors does not detract from the fact there is a scientific justification for the legislative response in issue.

[98] The fact the milk from the Glencolton Farms cows has never been proven to have been unsafe for human consumption or to have caused illness in any of those who have consumed it or anyone else is not determinative of the "risk to public safety" issues from a constitutional perspective. The *Charter* does not mandate a cow by cow or herd by herd assessment to establish a risk to public safety. The gross disproportionality threshold requires "a substantial measure of deference to the legislature's assessment of risk to public safety and the need for the impugned law". *Cochrane v. Ontario (Attorney General)*, (2008), 92 O.R (3d) 321 (C.A.), at para. 31; *R. v. Heywood*, [1994] 3 S.C.R. 761 at 793; and *R. v. Clay* [2003] 3 S.C.R. 735 at para. 40.

[99] The balancing of the competing interests of preserving and maintaining public health on the one hand against the resultant limitations on the right to choose what we eat, on the other is similarly a matter for the legislature. The restrictions imposed on certain residents of Ontario, as far as the consumption, distribution and purchase of raw milk is concerned, are within the authorized ambit or scope of legislative authority. In view of the evidence presented at trial it cannot be concluded the law, as it presently stands, is overbroad from a constitutional perspective or too sweeping in its breadth. While it may effectively discriminate against non-farm dwelling raw milk consumers, that fact in itself does not necessarily render the law non-*Charter* compliant, particularly

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in relation to the Respondent who, as a dairy farmer, is not a member of the restricted group.

[100] It is also difficult to accept the Respondent's assertion that the legislative restrictions on the distribution of raw milk inherent in the *H.P.P.A.* and the *Milk Act* are "overly broad" when viewed in relation to the objectives of the two *Acts* in the manner "overbreadth" has been defined by the Supreme Court of Canada in *R. v. Heywood*, [1994] 3 S.C.R. 761. At para. 49 Cory J. wrote:

> " Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate".

(C) <u>Equality Rights s. 15</u>

[101] Section 15 of the *Charter* provides that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[102] By analogy the Respondent asserts a claim of discrimination on the basis of residency. The law is viewed as favouring rural, dairy farm based, raw milk consumers while effectively prohibiting the Provinces urban residents from exercising their lawful entitlement to consume raw milk.

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[103] In advancing this challenge the Respondent relies on the Supreme Court of Canada decision *Corbiere v. Canada (Ministry of Labour and Northern Affairs), [1999] 2 S.C.R. 203* as authority for the proposition that one's place of "residence" may serve as a recognized basis to found a s. 15 *Charter* violation.

[104] *Corbiere v. Canada* involved consideration of certain provisions of the *Indian Act* and the fact only those individuals living on the reserve were lawfully entitled to vote in band elections. The Court's expressed restraint in recognizing residence as an analogous ground, for "average Canadians", to the equality rights specified in s. 15 is noted by the Respondent, nevertheless it is submitted that the same legal reasoning should apply to consideration of the on-farm/off -farm distinction arising from the practical implications to the consumers of raw milk arising from s. 18 (1) and (2) of the *H.P.P.A.*

[105] On review of the court's decision in *Corbiere*, it is clear that the Court was not intending to recognize "residence" generally as the analogous, or like ground to those specifically enumerated in s. 15 (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.) This point is amplified in the reasons of Justice McLachlin, as she then was, and Justice Bastarache at paragraph 15:

> "Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its

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> inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

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[106] The Respondent submits the *H.P.P.A.* effectively creates a discriminatory distinction between on and off farm dwellers as far as the exercise of the lawful entitlement to consume raw milk is concerned. Obviously, as a farm dweller, the Respondent cannot succeed with the s. 15 complaint even if the on-farm/off-farm distinction is concluded to be "analogous". The limitation of "residence" as a recognized analogous ground for the limited purpose of the *Indian Act* in *Corbiere v. Canada* persuades me that residency is also not an analogous ground that can be relied on here by the off-farm consumers of raw milk.

Conclusion

[107] For the forgoing reasons I conclude as follows:

- The Respondent has not established standing to advance the *Charter* violations alleged by Eric Bryant and James McLaren.
- The Respondent has not established a breach of s. 7 (security of person) s. 2 (a) (freedom of religion) or s. 15 (equality rights) in relation to himself.

[108] The *Charter* Application is therefore dismissed.

(E) Disposition or Appeal

[109] The *Provincial Offences Act*, s. 121, defines the powers of the reviewing court on appeal against acquittal. It provides that the court may allow the appeal, set aside the finding, and order a new trial or enter a finding of guilt with respect to the offence(s)

which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.

[110] The general rule is that the Crown can obtain appellate relief against acquittal only where it is demonstrated that the verdict would not necessarily have been the same had the trial been properly conducted: *R. v. Vezeau*, [1977] 2 S.C.R. 277, *R. v. Morin* (1987), 44 C.C.C. (3d) 193 (S.C.C.). Additionally, a verdict can be set aside as unreasonable where the trial justice entered a verdict inconsistent with the factual considerations reached: *R. v. Bioniaris*, [2000] 1 S.C.R. 381.

[111] In assigning a restricted interpretation to the applicable provisions of the *H.P.P.A.*, that was inconsistent with the public safety objective of the *Act*, the justice made a reversible error. In large measure, this error of statutory interpretation led to a misapprehension of the evidence presented at trial as that evidence relates to the substance of the charges in issue. I conclude, but for this error, and the justice's credibility assessment relating to two of the *H.P.P.A.* allegations, the verdict of acquittal would not have been available to the Respondent in relation to the *H.P.P.A.* and the *Milk Act* charges. The Appellant has clearly demonstrated that absent this error the verdicts would not necessarily have been the same: *R. v. Power*, [1994] 1 S.C.R. 601.

[112] Further, but for this error, the justice's initial assessment of the Respondent's culpability would have been correct subject to the application of the defence of honest but mistaken belief that I have concluded applies to the three alleged violations of the 1994 s. s. 13(1) *Health Promotion Act* "cease and desist" Order contrary to s.100 (1) and the credibility considerations concluded by the justice to impact the viability of the August

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22 and October 17, 2006, s. 18(2), cheese sale allegations.

Re: Gift vs. Sale and the Application of *Regina v. W.D.*

[113] The Appellant asserts the trial justice erred in accepting the Respondent's trial testimony in relation to his asserted gifts of two small quantities of cheese to the undercover investigator, Ms. Atherton, prior to her enrollment as a cow-share member. The justice is submitted as having misconstrued the credibility assessment referenced in *Regina v. W. D*. by accepting the Respondent's assertion of material fact without explaining the rationale for the rejection of the investigator's testimony, or having considered the Respondent's admissions on the totality of the trial record. The uncertainty of the Respondent's recollection of the specific transaction in issue and his reliance on his general practice of not selling milk or milk products to non cow-share members, when contrasted to the detailed recollections of the investigator, in regard to the specifics of the transactions in issue, are submitted as undermining the resultant credibility assessment.

[114] Having reviewed the trial record in relation to this issue and the justice's rationale for his stated preference for the Respondent's testimony I am unable to conclude that *R. v. W. D*. has been misapplied. The trial justice's decision is entitled to deference on review. As a result the acquittal shall be affirmed with respect to the two s. 18 (2) sale offences arising from the purported gifts of cheese on August 22 and October 17, 2006.

[115] I do not however accept the Respondent's submission that the gifts of the unpasteurized cheese do not constitute acts of prohibited "distribution". Given the public

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health objectives of the *H.P.P.A.* I conclude the dissemination of the unpasteurized cheese product to Ms. Atherton is sufficient to constitute an act of distribution. "Distribution" in this context must be interpreted as widely as possible. I do not accept a more expansive form of dissemination is required, for instance a distribution to more than one person, for the offence to be made out. As a result the Respondent shall be found guilty of the s. 18 (2) distribution offences arising from the August 22 and October 17, 2006 transactions.

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The Deficient Information

[116] The trial record indicates the Respondent was arraigned on a count relating to a s. 18(1*) H.P.P.A.* charge of distributing unpasteurized milk that appears to relate to an offence date of November 7, 2006. The date of the alleged offence was not read and is omitted from the information or charging document itself. My review of the trial record does not indicate that this apparent oversight was ever corrected by re-arraignment or a request to have the information amended to correspond to the evidence adduced. A review of the information itself confirms this understanding. In considering whether this charge should be quashed I note the broad powers to amend a defective information in sections 33.34 and 35 of the *P.O.A.* Note is also made of the fact the count in issue appears on a separate two count information that references a date of offence of November 7, 2006 in the first count alleged. The authority of the Court to amend the information on appeal, unless it is of the opinion that the defendant has been mislead or prejudiced in his or her defence of the charge, is referenced in s. 117(1) (a.1).

[117] Generally an omission of the date of offence is viewed as an essential component of a charge. The rationale for this is based on the fact those charged must

know the particulars of the charge or charges he or she must meet. The principle of fundamental trial fairness is noted by Binnie, J. for the majority, in *R. v. G. R.*, [2005] 2 S.C.R. 371 at para 2.

[118] The remedy in the face of the omission on essential averment, such as the date of offence, usually results in a defect that results in the charge being quashed. The *P.O.A.* directs that a defective information should be amended unless the amendment might cause the defendant to be misled or prejudiced in his or her defence or on appeal (See s. 33, 34, 35 and s.117 (1) (a.1).

[119] On reflection, given that this issue is raised for the first time here, I conclude the Respondent has not been prejudiced or misled, at his trial or on appeal, by the omission of the date on the second count referenced in this information. The first count identified the transaction in issue and that count was responded to by the Respondent at trial. It cannot be concluded that the Respondent would be prejudiced in this appeal if the count were to be amended pursuant to s. 117(1) (a.1) of the *P.O.A.* to reflect the date of offence, November 7, 2006. Accordingly, the date will be added to the count in issue and the information amended to reflect the evidence adduced at trial.

Quantity of Product Conveyed

[120] The Respondent's counsel asserts the quantities of cheese conveyed in relation to the transactions noted above were so small as to amount to a trifling amount not warranting a finding of culpability. In legal terms, the Respondent contends these charges do not warrant a finding of guilt as the law does not concern itself with very small or trifling matter, invoking the legal maxim "*De minimis non curat lex*".

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[121] As this legislation (the *H.P.P.A.*) is directed to the maintenance and prosecution of public health generally, and the prosecution of offences that may negatively impact public health, it cannot be concluded that the relatively small amount of unpasteurized milk product conveyed is so insignificant so as not warrant a finding of guilt. The nature and amount of the milk or cheese in issue may be a consideration in the determination of sentence but is not viewed as a relevant factor in the determination of the Respondent's culpability in relation to the offences alleged.

[122] The Respondent's acquittal with relation to the sole remaining *Milk Act* charge, of operating a plant in which milk or cream products are processed, will also be overturned and a guilty verdict registered. The Appellant established at trial that milk and milk products were processed at the Respondent's farm without compliance with the licensing requirements in the *Act*.

[123] The acquittals on the three s. 100 (1) *Health Protection and Promotion Act* charges are affirmed for the reasons previously discussed.

Other Matters

[124] Counsel are requested to contact the Trial Co-ordinator, Ms. Maryann Knetsch, at the Ontario Court of Justice, Newmarket, telephone (905) 853-4817,or Email: Maryann.Knetsch@ontario.ca to schedule a date for the sentencing hearing. Once a convenient date has been secured counsel are requested to serve and file a brief outline of their respective sentencing positions and the authorities upon which they intend to rely two weeks in advance of the scheduled hearing date.

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Appendix "A"

<u>The Trial Testimony of MNR Investigator Susan Atherton</u>

[125] Acting under the alias "Susan Taylor" (p. 26, January 27, 2009 Trial Transcript) Ms. Atherton watched the blue bus park, just down the road from Waldorf School, on June 27, 2006. People were observed to be lined up at the bus with coolers in hand. As people came out of the bus, the line would move forward. Those coming off the bus had glass jars with a white liquid in them, bakery products and eggs. Ms. Atherton did not get on the bus. She purchased strawberries on a rack outside the bus from the Respondent (pp. 29-31, January 27, 2009 Trial Transcript).

[126] On July 26, 2006, Ms. Atherton observed people lined up with boxes and containers alongside and in the blue bus outside Waldorf School. They exited the bus with heavier containers (p. 35, January 27, 2009 Trial Transcript).

[127] August 22, 2006, Ms. Atherton observed the blue bus at Waldorf School. She observed 12-14 "customers" when she arrived. She got on the bus. There were display shelves on the sides of the interior of the bus with pastries, honey, eggs, produce and cheese. She saw milk in jars at the back of the bus stored in crates. She observed transactions involving the exchange of the milk to people who were lined up in the bus. She observed individuals selecting items from display racks and paying the Respondent. He appeared to know most of the customers by name. Ms. Atherton bought soft cheese wrapped in cellophane for $3.10. He indicated to someone else that the cheese was "made Friday". The Respondent provided Ms. Atherton with a copy of the "Cow-Share Members Handbook" after she paid for the cheese. She discussed the six-year

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membership for $300 with the Respondent. Later at trial, Ms. Atherton confirmed that she had in fact acquired the unpasteurized cheese in question as it had been seized and subsequently frozen in the lab. It was tested and found to be "unsafe for consumption as per Health Canada guidelines" (pp. 36-40, 75-76 and 81-83, January 27, 2009 Trial Transcript).

[128] On October 17, 2006, Ms. Atherton again observed customers lined up at the bus. Some customers were waiting to go into the bus and others were coming out with product. Ms. Atherton again bought cheese wrapped in cellophane for $3.20 directly from the Respondent. She also observed other people purchasing dairy products, including milk and cheese, from the Respondent. Ms. Atherton advised him that she wanted to become a cow-share member. He advised that if she went to the farm on Friday, she could register to become a member there and secure her milk at the farm itself. He advised her to attend between 3:00 p. m. and 6:30 p. m. to buy milk. Ms. Atherton did not see anyone produce a membership card and did not observe anyone being asked to establish proof of their membership before they made their purchases. The Respondent was observed to inform the customers as to the total cost of their purchases (pp. 40-42, January 27, 2009 Trial Transcript).

[129] On October 20, 2006, Ms. Atherton was again working undercover with M.N.R. conservation officer Victor Miller, alias "Victor Douglas". Together they attended Glencolton Farms for the entire day. The lone employee in the farm store, Beverley Viljakainen, was taking money for customer purchases. The farm store appeared to be open to the general public. People were observed in the store. They were noted to make

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purchases in a manner similar to what she had witnessed at the bus. The sign on one of the milk coolers said, ‘members only’. Ms. Viljakainen was observed noting or recording the names of the customers. A milk cooler, containing between 2-3 dozen bottles of milk, was in the store. Cheese, meats, potatoes, pastries, some vegetables and bread were also on display. Customers were buying milk and cream from the coolers. The investigator opened the door and removed the items she wanted from the shelves. Ms. Atherton purchased a cow-share membership from Ms. Viljakainen by writing a cheque in the amount of $300 to Glencolton Farms. There was no application form to be completed before becoming a member. She was not provided with a membership handbook when she purchased her cow-share membership. She purchased milk, cream, quark (a type of soft, white, cheese) and meat for $30. Each item had an identifying sticker plus the price tag. She subsequently received emails about the “My Cows Moosletter” from Ms. Viljakainen at the address she provided as part of the cow-share registration process. She received her membership card, which read “milk share”, Glencolton Farms shareholder Susan “Taylor”, in December 2006 (pp. 42-49, 55 and 59-62, January 27, 2009 Trial Transcript).

[130] On October 27, 2006, continuing surveillance revealed the farm store to be very busy. The milk and cheese products were observed to be stored in the same location as on October 20. Ms. Atherton and Mr. Miller did not go directly into the farm store, as they assisted another member with loading milk from the milk house into a cow-share member’s vehicle. They purchased three jars of milk and a package of soft cheese, hamburger and cider from Ms. Viljakainen. Ms. Atherton observed others making

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purchases (pp. 55-57, January 27, 2009 Trial Transcript). After finishing in the store, they went into the barn and proceeded to the milking parlour and a storage area. The investigators were shown a cheese making area. They observed equipment, including milking stations and stanchions (a restraining device to prevent a cow's head from moving forward), where cattle were housed in that area. There was a milk storage area. Wooden boxes with jars full of milk were observed. She noted cheese curd in a separate area next to the milk station (pp. 57 and 63-66, January 27, 2009 Trial Transcript).

[131] On November 7, 2006, Ms. Atherton attended the Waldorf School location to observe the blue bus operation. She got into line with the other customers and eventually purchased a jar of milk for $7 from the Respondent. However, the price of the purchase was not recorded in her notes. She also observed others buying milk, pastries, eggs and other products (pp. 57-58, January 27, 2009 Trial Transcript).

[132] On November 21, 2006, MNR investigators, accompanied by Public Health Inspectors, executed a search warrant on the farm. Collectively, these officials seized dairy production equipment, machinery and documentation, including correspondence with "all milk share holders" (Agreed Facts – Appendix C), a contract list of shares for "customers" (Agreed Facts – Appendix D) and the bus sales and farm sales for milk and milk products dated May 23, 2006 through to November 7, 2006 (Agreed Statement of Facts – Appendices E and F; pp. 49-51, January 26, 2009 Trial Transcript). They found large quantities of milk, cheese, cream and other dairy and non-dairy products displayed and stored in the farm store and blue bus. Laboratory testing revealed the milk products were neither pasteurized, nor sterilized (p. 51, January 26, 2009 Trial Transcript).

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Ministry of Natural Resources Investigator Victor Miller

[133] Victor Miller is an investigator with the Intelligence Investigation Services Unit of the MNR. He first came into contact with the Respondent on July 28, 2006, when he attended Glencolton Farms in an undercover capacity as "Victor Douglas". Mr. Miller did not purchase a cow-share membership (p. 106, January 27, 2009 Trial Transcript).

[134] On October 20, 2009, Victor Miller went to the store at Glencolton Farms with Ms. Atherton. Ms. Viljakainen was attending the customers that come into the store to purchase product. Purchases were recorded by Ms. Viljakainen in a notebook on the counter. Mr. Miller observed a cold storage, stainless steel, refrigeration unit, a freezer unit and empty containers and jars on the floor. The shelves contained bakery products. On the floor, in front of the service counter, vegetables were located. In the cold storage unit were jars full of a white substance that appeared to be a dairy product. There were smaller jars that stored cottage cheese. Ms. Atherton purchased several large jars and a few small jars of milk, plus meat, bread and a cow-share membership. Lab testing confirmed the white liquid was unpasteurized milk. Ms. Viljakainen seemed to be aware that Ms. Atherton had previously spoken to the Respondent on the phone about purchasing a cow- share. Ms. Atherton asked for milk, and Ms. Viljakainen accordingly directed the investigator to the cold storage area to secure the clear jars containing white liquid that Ms. Atherton ultimately purchased (pp. 88-90 and 96, January 27, 2009 Trial Transcript).

[135] While being cross-examined, Investigator Miller confirmed that the Respondent had advised him that "the membership card would be a mandatory requirement" in order

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to be a part owner of a cow. He agreed that the notes of his interaction with the Respondent served to confirm public access to the milk produced at Glencolton Farms was restricted to cow-share members and not to the public generally (pp 102-103, January 27, 2009 Trial Transcript).

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[136] On October 27, 2006, Mr. Miller again attended Glencolton Farms with Ms. Atherton. There were many people in the store that day and others lined up outside the store. Mr. Miller observed people purchasing jars of milk that were located alongside other produce. The purchasers were seen to remove jars from the refrigeration unit. Ms. Viljakainen recorded each sale. Ms. Atherton purchased some cheese from Ms. Viljakainen. The barn had a cold storage area, a freezer unit and an area that looked like a place used to manufacture cheese. It also had an area where there were cream cans or milk cans. Mr. Miller was given a tour of both the milking area and cheese production areas. The next day Mr. Miller drove to the Agricultural Investigative Unit where the purchased items were taken to the storage unit and into the custody of Investigator Campbell. Samples were taken from the various containers for testing. Miller catalogued all of the seized items (pp. 92-96 and 108, January 27, 2009 Trial Transcript).

(B) <u>Lead MNR Investigator Brett Campbell</u>

[137] Investigator Campbell was involved in the November 22, 2006 execution of the search warrant at Glencolton Farms. He received a number of seized items from Mr. Miller the following day. Investigator Campbell was present with Ms. Atherton when she received the Glencolton Farms cow-share membership card.

[138] At the time of the execution of the search warrant Investigator Campbell

acknowledged that he was not aware of any specific risk to public health originating at Glencolton Farms when the authorities decided to investigate the Respondent. The names of all cow-share members were seized during the search. None of the members were contacted in regard to any health related concerns they might have regarding the milk products they had been consuming. The focus of the investigation was acknowledged to be the Respondent and Glencolton Farms (p. 121, January 27, 2009 Trial Transcript).

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(C) <u>Grey-Bruce Health Inspector Andrew Barton</u>

[139] Health Inspector Andrew Barton testified that he was not initially aware that a s. 13 *Health Protection and Promotion Act*, R.S.O. 1990 Chapter 4.7, order had been issued by another inspector from the Bruce Grey Owen Sound Health Unit against the Respondent in 1994 and that this Order had been reviewed and upheld by the Health Protection Appeal Board.

[140] After the search of Glencolton Farms was completed on November 22, 2006, Mr. Barton wrote to the Respondent explaining the purpose for "visit" and describing the earlier s. 13 Order from 1994. Inspector Barton's letter was personally delivered to the Respondent on November 24, 2006. The letter was intended to indicate that the Health Unit and MNR "wished" the Respondent to cease storing, distributing raw milk products (pp. 18-19, January 28, 2009 Trial Transcript).

[141] During the execution of the warrant the blue bus was searched. The seats had been removed in the bus and replaced by shelving. There were food products on the shelves, including bread, cinnamon buns, oats and vegetables. Underneath, in some

coolers and a chest freezer, meat products and some dairy products, including milk, quark and cheese were observed. The milk products were stacked and stored in plywood boxes. Mr. Barton estimated there were in excess of 32 boxes. There were one or two coolers underneath. Mr. Barton recalled there were six two-litre jars of milk in a box. The store fridges had meat and a small amount of dairy products. The jars of dairy products had screw tops. The milk was sent to a laboratory for testing. It was determined to be raw or unpasteurized (pp. 9-13, January 28, 2009 Trial Transcript).

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[142] The raw milk and milk product seized was dumped in a local landfill site as a deemed health hazard, pursuant to s. 19(1) and s. 19(4) of the *H.P.P.A* (pp. 17-18 and 25-26, January 28, 2009 Trial Transcript). Inspector Barton also testified that "raw milk products are considered a health hazard [because] they are a fantastic vehicle for transferring pathogenic organisms, and there's plenty of, a large number of, infectious outbreaks [...]" (p. 25, January 28, 2009 Trial Transcript). Inspector Barton indicated the determination that the disposed milk and milk product were health hazards was "based partly on what we'd been told and also the results of some analysis that had been done on some earlier milk products, and then also based on what was said by the Respondent, and what we saw during the inspection" (p. 26, January 28, 2009 Trial Transcript).

[143] In February 2007, Inspector's Barton and Munn returned to the farm store to see if any raw milk or dairy products were displayed for sale. Nothing was found. (pp 19-20, January 28, 2009 Trial Transcript).

(D) <u>Grey-Bruce Health Inspector Christopher Munn</u>

[144] Inspector Munn was contacted by Brett Campbell of the Ministry of Natural

Resources on September 8, 2006 in relation to an E-coli outbreak in Simcoe County. As part of a follow-up communicable disease investigation by Simcoe County Health Unit, it was determined that the most probable cause of illness was raw milk. Their investigation led to a concern that raw milk was being produced and distributed from Grey-Bruce or possibly Waterloo counties. Brett Campbell indicated that the Health Unit would likely be called in to assist with the *H.P.P.A.* aspects of the investigation of Glencolton Farms as the Respondent's cow share programme was suspected as being a possible source of what was believed to be an outbreak related to raw milk (pp. 43-44, January 28, 2009 Trial Transcript).

[145] Inspector Munn was aware of the Health Unit's 1994 Order restraining Mr. Schmidt from distributing and selling unpasteurized milk from his farm.

[146] Inspector Munn's role during November 21, 2006 search was to inspect the farm premises to determine whether there was compliance with the 1994 Order. He was involved in the search of the farmhouse and blue bus. Milk containers, quark and yogurt containers were noted as being provided by another local company. The milk packaging was not labelled. The investigator also visited the store. Mr. Barton noted everything he saw in the store. As the milk was recognized as a potential health hazard, it was ordered seized. Samples of the milk were provided to Ministry of Natural Resources for testing to determine if it was unpasteurized and for a bacterial analysis.

Defence Witnesses Trial Testimony

(A) Cow-Share Member Eric Bryant

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[147] Mr. Bryant testified that he normally drives out to the Glencolton Farms every two weeks to pick up a supply of raw milk. After encountering digestion problems 12 years before he became a vegetarian. He follows the "Ascene teaching" that has led him to embrace raw milk as part of his religious practise. He is the owner of two cow-shares and conducted his own research regarding the benefits and potential risks of raw milk. Mr. Bryant expressed his understanding that the cow-share arrangement involved a contract with Michael Schmidt and a continuing financial obligation to pay for the upkeep of cows (pp. 82-86, January 28, 2009 Trial Transcript).

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Trial Testimony of the Respondent

[148] The Respondent began his testimony by reading a18-page document as his verbatim evidence in chief (pp. 89-103, January 28, 2009 Trial Transcript).

[149] The Respondent indicated that he established the "lease a cow programme" in 1992. Between 1992-1994, but prior to the Grey-Bruce Health Unit Order in February 1994, he stated that there was no reported illness from the consumption of the raw milk produced at Glencolton Farms. The *H.P.P.A.* Order was issued to him in his capacity as the operator of the farm. The raw milk and raw milk products were "deemed to constitute a health hazard". The Health Protection Appeal Board upheld the order, concluding that raw milk was in fact a health hazard (p. 93, January 28, 2009 Trial Transcript). In the subsequent 1994 investigation, the Ontario Ministry of Agriculture and Food and Rural Affairs ("OMAFRA") destroyed hundreds of pounds of butter, hundreds of litres of milk and numerous rounds of cheese. The Respondent indicated his compliance with the terms of the *H.P.P.A.* Order, which he intimated applied to a previous farm operation at a

different location. Based on the subsequent transfer of title of lots 38, 39 and 40, Concession 2, Durham, in Grey County Ontario, he believed that the 1994 Order was no longer of any force and effect (p. 95, January 28, 2009 Trial Transcript).

[150] The Respondent developed the cow-share programme at its current location, Lot 44 Concession 3 Glenelg, where the cows "were owned by various cow-share people." This involved a private contractual agreement with the shareowners. He did not advertise for cow share members. He asserted that the operation fell outside the definition of "plant" contained in the *Milk Act* because of the expansion of the milk house directly attached to the barn (p. 96, January 28, 2009 Trial Transcript). That facility had a bulk tank for milk cooling, a separator for cream, shelves, a dishwasher and a walk-in cooler as described by Ms. Atherton and Mr. Miller.

[151] The Respondent testified that he had several friendly conversations with the Health Inspector for the region after the cow-share programme had been initiated. No government intervention occurred for almost 12 years. During this time the Respondent gave lectures at universities and cooking schools about the importance of farmer and consumer relations and cow-sharing (p. 97, January 28, 2009 Trial Transcript).

[152] Since 1996, he has provided a delivery service by bringing, cow-share owner's milk to the GTA. Members must have a card. Only cow-share members are eligible to receive milk or milk products. The Respondent is known to give potential members some raw milk product to try out before they commit to the programme (p. 99 January 28, 2009 Trial Transcript). His primary concern was to ensure a reliable supply of raw milk for those who need the milk for health reasons. Accordingly, the Respondent

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admitted that he instructed Beverley Viljakainen to validate Ms. Atherton as a cow-share member based on her representations of a health-based need for raw milk. In retrospect, these representations were viewed by the Respondent as being a false pretence as they were untrue (p. 100, January 28, 2009 Trial Transcript). The Respondent noted that not all his members consume raw milk for health reasons. Many just express a preference for unpasteurized milk. Ms. Atherton was given a small quantity of cheese before she became a member in order to try it out. In the Respondent's own words, he "never asked for money for that reason that she was not a member yet [...] but as to her testimony, the price was written on the package. Therefore I can only assume that she believes she may have paid for it. By my clear recollection, "there was no sales transaction" (p. 100, January 28, 2009 Trial Transcript).

[153] The Respondent stated that there was never a cooler with glass doors at Glencolton Farms. The cooler has always been stainless steel. He indicated there had never been a glass door displaying dairy products for sale to the public. A sign on the milk fridge read "Members only". The Respondent confirmed that Inspector Miller was correct when he advised that the store did not have a cooler with glass doors to display milk products (p. 101, January 28, 2009 Trial Transcript).

[154] The Respondent stated that he does not sell raw milk to the public. Instead, he provides a boarding service for cow-share owners. Cow-share owners have access to the health records of their cows. He provides access to milk test results and keeps frozen milk samples from every production, for a period of four weeks, for backup testing. He has never had anyone report that they have been made ill due to the milk he provided. An

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annual inspection of the entire operation is conducted by an independent dairy inspector, in addition to frequent tests of the cow manure, for pathogens, conducted by a licensed veterinarian. No pathogens harmful to human health have ever been found in Glencolton Farm's raw milk. Monthly tests are conducted by the Dairy Herd Improvement Organization to check for somatic cell counts and milk quality verification. These tests have yielded "great results". The herd is tested regularly under supervision of licensed veterinarian. The Respondent advised that he keeps an updated cow-share membership list (pp. 101-102, January 28, 2009 Trial Transcript).

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The Cross-examination of Mr. Michael Schmidt

[155] The Respondent testified that he is not a cow-share member (p. 136, January 28, 2009 Trial Transcript).

[156] He acknowledged receiving Ms. McLeod's "cease and desist" Order of February 1994, which was addressed to "Michael Schmidt operating as Glencolton Farms". The location of the farm specified in the 1994 Order (Lots 38, 39 and 40) was indicated as being a half an hour walk from Glencolton Farms' current location, lot 44. All of the lots are in Glenelg Township in Grey County (pp. 130-131, January 28, 2009 Trial Transcript). Following the issuance of the 1994 Order the Respondent launched an appeal of that Order. The Health Services Appeal and Review Board provided its decision in writing. The Review Board decision confirmed that raw milk was a health hazard. The Respondent believes they got it "totally wrong" but acknowledged the Order was never appealed or made subject to judicial review (pp. 132-133, January 28, 2009 Trial Transcript). The Respondent accepted that the Order was a determination of certain

rights between himself and the Grey-Bruce Health Unit (p. 135, January 28, 2009 Trial Transcript). He also agreed that the Order directed him to stop the "manufacturing, processing, preparation, storage, handling, or display of unpasteurized milk and milk products" (p. 137, January 28, 2009 Trial Transcript). He stated that he believed the Order did not currently apply to him because he was no longer producing raw milk at the same location as referred to in the Order (pp. 139-140, January 28, 2009 Trial Transcript). He viewed the Order as being connected to the previous farm property (p. 141, January 28, 2009 Trial Transcript).

[157] The Respondent agreed that there was raw milk and raw milk products stored on Glencolton Farms on October 20, 2006. He could not recall if raw milk and milk products were stored and displayed on October 27, 2006 as he was on the bus on that date. On November 21, 2006, raw milk and milk products were also acknowledged as being located on the blue bus (p. 138, January 28, 2009 Trial Transcript).

[158] The Respondent acknowledged the accuracy of the statement he provided to Investigator Herries. He agreed that the cow-share handbook prepared by cow-share member Andrea Lemieux (p.107, January 28, 2009 Trial Transcript) accurately outlines the programme's operation. There is no other documentation relating to the cow-share agreement (p.108, January 28, 2009 Trial Transcript). The sale of a cow works on the basis of a hand shake. The nature of the contractual agreement is based on an understanding of the handbook, a membership card and "a personal agreement" between Glencolton Farms and, the various cow-share members (p.108, January 28, 2009 Trial Transcript).

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[159] The Respondent advised that he is not disputing the fact unpasteurized milk cannot legally be sold anywhere in Ontario (p. 108, January 28, 2009 Trial Transcript). He acknowledged pleading guilty to two offences under the *Milk Act*, ss. 15(1) (2) in 1994 and agreed he received two year's probation. He also entered a plea of guilty to a s. 18 *H.P.P.A.* infraction and received a $3500 fine (p.109, January 28, 2009 Trial Transcript).

[160] Confronted by the fact that the member's handbook indicates that a member is a "part owner of the milk production"; whereas his evidence in-chief was that a member was buying a share in a cow, the Respondent conceded "it could be both": the essential fact is that they actually have a cow" (pp. 111-112, January 28, 2009 Trial Transcript). The Respondent stated that a "loophole" in the *H.P.P.A.* permits a private contract between two people to lawfully obtain a product not available normally to the public (p. 112, January 28, 2009 Trial Transcript). The *H.P.P.A.* does not preclude the drinking of raw milk while the applicable statutes prohibit the selling/distribution of raw milk (p.115, January 28, 2009 Trial Transcript). At trial, the Respondent stated, "There are no regulations in place when you privately own your cow, which nobody can interfere with in the drinking of milk, as it comes from the cow".

[161] The cow-share members hire the Respondent to milk and feed the cows (p. 117, January 28, 2009 Trial Transcript). The Respondent acts as a mentor because of his knowledge. "I'm the milkman, but I just mean from a technical point of view, I'm asked to load the bus. Sometimes I'm asked to bottle the milk. Whatever is required? " The Respondent is the one responsible for the production of milk. He handles the milk, stores

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the milk at the farm and transports it on the bus (for delivery to the cow-share membership) (p.136, January 28, 2009 Trial Transcript).

[162] Shareholder responsibilities do not include the care or maintenance of the cows (p. 118, January 28, 2009 Trial Transcript). The Respondent testified that members instruct him how to take care of their cow, in order to ensure it is healthy, properly fed and clean (p.118, January 28, 2009 Trial Transcript). While this information is not in the handbook, the Respondent states it was discussed with Ms. Atherton. The Respondent also stated that he would have discussed these matters with her on the blue bus based on his general practice and the sort of questions people usually ask about the conditions for becoming a cow-share member (p. 119, January 28, 2009 Trial Transcript). He was unaware if Ms. Atherton had the name of her cow on her card or if she was led by one of the members to the barn to see her cow. A review of the cow-share documents that were filed as exhibits at trial reveal that a specific cow was not named on her card or any of the other membership cards. The Respondent advised that a new process is developing where, once they are official members, the cow-share members come to the barn and choose their cow (p. 120, January 28, 2009 Trial Transcript).

[163] The Respondent testified that the private contract between the parties has nothing to do with public health. It involves a conscious decision of individuals to get a product that they think is good for them. It is viewed as empowering people who want to make a decision to drink raw milk. By entering into a private agreement, they have their own milk (p. 125, January 28, 2009 Trial Transcript). “What we do in our house, public health has no right to go in…” (p. 125, January 28, 2009 Trial Transcript). The cow-

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share arrangement is purported to allow the milk products to be brought to the cow-share members without falling under the jurisdiction of the local health authority.

[164] The cow-share handbook introduction reads as follows: "This booklet is intended solely for informational purposes. You consume raw dairy products at your own risk. This disclaimer is intended to advise cow-share members that they consume raw milk at their own risk. The purpose of the statement is to confirm you are responsible if you get sick from consuming raw milk (pp. 125-126, January 28, 2009 Trial Transcript).

[165] The Respondent could not say that Ms. Atherton did not purchase cheese from him twice before she became a cow-share member (August 22 and October 17, 2006). He refers to his usual practice or principle that he "always follows":

> When somebody wants to become a cow share owner and they tell me all their stories [...] that's their own decision why they want to drink the milk [...] I'm very careful when people come and want to start, and they haven't had raw milk before, to see if they can actually digest it properly or if there is any adverse reactions. So what I usually do is say no, you can't buy anything [but] I can give you a piece [...] to try out and you let me know [but] I said I cannot sell that to you, you're not a member [...] if you want to pay, you can always make a donation to the farm, but I'm not selling that to you (pp. 127-128, January 28, 2009 Trial Transcript).

[166] He stated that the reason he did not give Ms. Atherton milk instead of the cheese is because the quantity of milk on hand at the blue bus was limited and just enough to meet the needs of the cow-share members who were there. Accordingly, Ms. Atherton was asked to attend at the farm if she wished to obtain some milk (p. 128, January 28, 2009 Trial Transcript). He believed there was sufficient cheese on hand to permit her to sample that product.

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[167] When Ms. Atherton attended at the farm on October 20, 2006 and purchased her membership, she also received raw milk. The Respondent could not name a particular cow that the milk had come from, or say that it corresponded with Ms. Atherton's choice, or whether a specific cow had been assigned to her through the "cow-share" arrangement. He speculated that there would likely have been a few more bottles of milk than the farm store required and permitting her to receive some of the additional available milk (p. 129, January 28, 2009 Trial Transcript).

Acknowledgement

[168] Appreciation is extended to Jeremy Tatum, student-at-law, for his helpful assistance in the preparation of the trial summary in this matter. His contribution to the editing of this judgment and the attendant legal research, in his capacity as Law Clerk to the Court, is gratefully acknowledged.

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TAB 22

Croplife Canada v. City of Toronto*

[Indexed as: Croplife Canada v. Toronto (City)]

75 O.R. (3d) 357
[2005] O.J. No. 1896
Docket: C41220

2005 CanLII 15709 (ON CA)

Court of Appeal for Ontario,
Goudge, Feldman and Lang JJ.A.
May 13, 2005

* Application for leave to appeal to the Supreme Court of Canada was dismissed with costs November 17, 2005 (Bastarache, LeBel and Deschamps).

Municipal law -- By-laws -- Validity -- Section 130 of Municipal Act to be given broad and purposive interpretation -- City having authority under general welfare power in s. 130 of Municipal Act to enact by-law limiting application of pesticides within City -- By-law not invalid because of existence of federal and provincial legislation dealing with same subject matter -- Municipal Act, 2001, S.O. 2001, c. 25, s. 130.

The respondent enacted a by-law which regulated the use of pesticides within the city under s. 130 of the Municipal Act, 2001. Section 130, which is in Part III of the Act, entitled "Specific Municipal Powers", provides that "A municipality may regulate matters not specifically provided for by this Act or any other Act for purposes related to the health, safety and well-being of the inhabitants of the municipality." The appellant, a trade association that included pesticide producers, challenged the authority of the respondent to enact the by-law. The motion judge upheld the by-law. The appellant appealed.

Held, the appeal should be dismissed.

The Act gives municipalities two kinds of powers. Part II of the Act gives municipalities the power of a natural person (s. 8) and, as well, ten broad "spheres of jurisdiction" (s. 11) within which municipal councils have wide discretion to enact by-laws. Part III of the Act gives municipalities specifically defined by-law making powers. Section 9(1) of the Act provides that "Sections 8 and 11 are to be interpreted broadly so as to confer broad authority on municipalities, (a) to enable them to govern their affairs as they consider appropriate; and (b) to [page358] enhance their ability to respond to municipal issues". The motion judge did not err in applying the broad and purposive approach to the interpretation of s. 130, despite the fact that that section is not one of the spheres of jurisdiction in Part II of the Act, but is a specific power under Part III. Historically, the courts interpreted the powers of municipalities to enact by-laws restrictively, applying Dillon's Rule, whic h stated that "a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those powers essential to, and not merely convenient for, the effectuation of the purposes of the corporation". However, in the 1990s, the Supreme Court of Canada began to move away from Dillon's Rule, favouring instead a broad and purposive approach that allowed for a more generous interpretation of municipal powers, with a view towards showing deference to, and respect for, the decisions of locally elected officials. Although s. 9(1) of the Act is contained in Part II and expressly requires a broad interpretation of the s. 11 spheres of jurisdiction, it imposes the same requirement for the interpretation of s. 8, the natural person power, which is found in Part II, but applies to the entire Act. Also, s. 9(1) contains no language that suggests that the broad approach is to be limited to the interpretation of the spheres of jurisdic tion and is not to be applied when interpreting other parts or sections of the Act. In light of the development of the jurisprudence in this area over the last 12 years and the clear adoption by the Supreme Court of a generous approach that accords deference to

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municipal governments, it would take clear legislative language to return to Dillon's Rule when interpreting those parts of the new Act not contained in Part II. Furthermore, it would be a retrograde step to apply the former, restrictive approach to interpret the balance of the Municipal Act, 2001 outside Part II, when the goal of modernizing the Act, as stated by the Minister of Municipal Affairs at the time, was to give municipalities in Ontario "the tools they need to tackle the challenges of governing in the 21st century".

The phrase "matters not specifically provided for in this Act or any other Act" in s. 130 merely restates, and modestly extends, the "rule against circumvention", that is, the rule prohibiting a municipality from making by-laws using the general welfare power to circumvent restrictions on its ability to enact by-laws regarding a particular subject matter found elsewhere in the Act. Under s. 130, a matter can be regulated by by-law so long as there is no other specifically related by-law making power elsewhere in the Act or in any other act. The by-law is aimed primarily at the matters of health, safety and well-being of the City of Toronto's inhabitants. Its municipal purpose therefore falls squarely within the authority granted by s. 130 of the Act. There is no specific municipal power to regulate pesticide use contained in the Act or in any other Ontario statute. Therefore, the limiting words of s. 130 do not preclude enactment of the pesticide by-law.

The by-law is not in conflict with federal or provincial legislation. The requirement of the general welfare provision in s. 102 of the former Act that by-laws not be "contrary to law" has been removed from s. 130 and is now set out in s. 14 of the Act, which provides that "A by-law is without effect to the extent of any conflict with, (a) a provincial or federal Act or a regulation made under such an Act; or (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation". Section 14 applies to by-laws made under Part III, including s. 130. The appellant argued that because the "impossibility of dual compliance" conflicts rule is articulated in s. 14, the words "matters not specifically provided for by this Act or any other Act" in s. 130 cannot be

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a reference to the same conflicts rule, but must have another [page359] meaning, and that the effect of the language of s. 130 is that a municipality only has the power to enact a by-law for health, safety or well-being where the subject matter of the by-law in pith and substance is not specifically provided for in any other Act. The appellant argued that the Pest Control Products Act, R.S.C. 1985, c. P-9 ("PCPA") and the Pesticides Act, R.S.O. 1990, c. P.11 together formed a comprehensive regime for the regulation of pesticides. Therefore, the subject matter is provided for in other legislation, causing the by-law to be ultra vires. That argument could not be accepted. As stated above, there is no basis to read the phrase "matters not specifically provided for by this Act or any other Act" as anything more than a restatement and extension of the rule against circumvention referring to other specific municipal by-law making powers. Moreover, the appellant's approach would reintroduce the approach to paramountcy, long since rejected in Canada, that legislation by one level of government occupies the field and precludes complementary legislation by other levels. The validity of tri-level regulation has been unambiguously endorsed by the Supreme Court of Canada as the accepted model in our federal system. It was not impossible to comply with the pesticide by-law at the same time as the federal PCPA or the Ontario Pesticides Act, and the by-law did not frustrate the purpose of those Acts. Therefore, the by-law was not rendered inoperative by the conflicts test in s. 14 of the Act.

114957 Canada Lte (Spraytech, Socit d'arossage) v. Hudson (Town), [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42, 200 D.L.R. (4th) 419, 171 N.R. 201, 19 M.P.L.R. (3d) 1, 2001 SCC 40; Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, [2005] S.C.J. No. 1, 257 Sask. R. 171, 250 D.L.R. (4th) 411, 331 N.R. 116, 342 W.A.C. 171, 2005 SCC 13, apld

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Milk Act, R.S.O. 1990, c. M.12, s. 20 [as am.]

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Municipal Act, 2001, S.O. 2001, c. 25, ss. 8, 9, 11, 14, 15, 130

Municipal Government Act, S.A. 1994, c. M-26.1

Pest Control Products Act, R.S.C. 1985, c. P-9

Pest Control Products Act, S.C. 2002, c. 28 [not in force]

Pesticides Act, R.S.O. 1990, c. P.11

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APPEAL from the judgment of Somers J. of the Superior Court of Justice, reported at (2003), 68 O.R. (3d) 520, [2003] O.J. No. 4828 (S.C.J.), upholding the validity of a by-law.

J. Scott Maidment, Jennifer Dent and Lisa Parliament, for appellant.

Graham Rempe, Susan L. Ungar and Mark Siboni, for respondent.

Justin Duncan and Robert V. Wright, for intervenors World Wildlife Fund and Federation of Canadian Municipalities.

Paul Muldoon and Marlene Cashin, for intervenors Toronto Environmental Alliance, Canadian Association for Physicians for the Environment, Sierra Club of Canada, Canadian Environmental Law Association, Environmental Defence and Ontario College of Family Physicians.

The judgment of the court was delivered by

[1] FELDMAN J.A.:-- The issue in this case is whether the City of Toronto had the authority under s. 130 of the new [page361] Municipal Act, 2001, S.O. 2001, c. 25 (the "Municipal Act, 2001" or the "new Act") to enact By-Law No. 456-2003, which limits the application of pesticides within the City.

[2] In its decision in 114957 Canada Lte (Spraytech, Socit d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42 ("Spraytech"), the Supreme Court of Canada held that the Town of Hudson in Quebec had the authority under a section of its Cities and Towns Act, R.S.Q., c. C-19, similar

to s. 102 of the former Municipal Act, R.S.O. 1990, c. M.45 (the "old Municipal Act" or the "old Act") to enact a by-law regulating the use of pesticides in the town. Section 102 of the old Municipal Act was the predecessor of s. 130 of the Municipal Act, 2001.

[3] The appellant says the Spraytech decision does not apply to s. 130 of the Municipal Act, 2001. Bearing in mind that the Municipal Act, 2001 was enacted after the Spraytech decision, s. 130 must be interpreted narrowly and restrictively because of, (a) its placement within the structure of the new Act and (b) the addition of new language into the section that makes it distinguishable from s. 102 of the old Municipal Act.

[4] The motion judge rejected the appellant's arguments and upheld the by-law. For the reasons that follow, I agree with the conclusion of the motion judge and would dismiss the appeal.

Background

[5] The appellant, a trade association that includes pesticide producers, challenges the authority of the City of Toronto to enact By-Law No. 456-2003, which regulates the use of pesticides within the city. The city enacted the by-law under s. 130 of the Municipal Act, 2001 on May 23, 2003. The by-law is set out in its entirety below:

CITY OF TORONTO

BY-LAW No. 456-2003

To adopt a new City of Toronto Municipal Code Chapter 612, Pesticides, Use of.

WHEREAS environmental protection has emerged as a fundamental value in Canadian society and the common future of every Canadian community depends on a healthy environment; and

WHEREAS the Council of the City of Toronto wishes to respond to the concerns expressed by City residents about health

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risks associated with the use of pesticides within the City of Toronto; and

WHEREAS avoiding unnecessary exposure to pesticides conforms to the precautionary principle as it applies to the use of pesticides; and

WHEREAS minimizing the use of pesticides will promote the health of the inhabitants of the City of Toronto; and
[page362]

WHEREAS pesticides used in lawn and garden care are known to enter streams and rivers, which discharge into Lake Ontario, the source of drinking water for the City of Toronto; and

WHEREAS under section 130 of the Municipal Act, 2001, by-laws may be passed by a municipality to provide for the protection of the health, safety and well-being of residents in the municipality; and

WHEREAS under section 425 of the Municipal Act, 2001, by-laws may be passed by a municipality for providing that any person who contravenes any by-law of the municipality, passed under the authority of the Municipal Act, 2001, is guilty of an offence;

The Council of the City of Toronto HEREBY ENACTS as follows:

1. The City of Toronto Municipal Code is amended by adding the following chapter:

Chapter 612

PESTICIDES, USE OF

612-1. Definitions.

As used in this chapter, the following terms shall have the meanings indicated:

ENCLOSED - Closed in by a roof or ceiling and walls with an

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appropriate opening or openings for ingress or egress, which openings are equipped with doors which are kept closed except when actually in use for egress or ingress.

HEALTH HAZARD - A pest which has or is likely to have an adverse effect on the health of any person.

INFESTATION - The presence of pests in numbers or under conditions which involve an immediate or potential risk of substantial loss or damage.

PEST - An animal, a plant or other organism that is injurious, noxious or troublesome, whether directly or indirectly, and an injurious, noxious or troublesome condition or organic function of an animal, a plant or other organism.

PESTICIDE - Includes

A.. A product, an organism or a substance that is a registered control product under the federal Pest Control Products Act which is used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects.

B.. Despite Subsection A, a pesticide does not include:

(1) A product that uses pheromones to lure pests, sticky media to trap pests or aequick-kill' traps for vertebrate species considered pests such as mice and rats.

(2) A product that is or contains any of the following active ingredients:

(a) A soap;

(b) A mineral oil, also called dormant or horticultural oil; [page363]

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(c) Silicon dioxide, also called diatomaceous earth;

(d) Bt (Bacillus thuringiensis), nematodes and other biological control organisms;

(e) Borax, also called boric acid or boracic acid;

(f) Ferric phosphate;

(g) Acetic acid;

(h) Pyrethrum or pyrethrins;

(i) Fatty acids; or

(j) Sulphur.

612-2. Restrictions.

A. No person shall apply or cause or permit the application of pesticides within the boundaries of the City.

B. The provision set out in Subsection A does not apply when pesticides are used:

(1) To disinfect swimming pools, whirlpools, spas or wading pools;

(2) To purify water intended for the use of humans or animals;

(3) Within an enclosed building;

(4) To control termites;

(5) To control or destroy a health hazard;

(6) To control or destroy pests which have caused infestation to property;

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(7) To exterminate or repel rodents;

(8) As a wood preservative;

(9) As an insecticide bait which is enclosed by the manufacturer in a plastic or metal container that has been made in a way that prevents or minimizes access to the bait by humans and pets;

(10) For injection into trees, stumps or wooden poles;

(11) To comply with the Weed Control Act and the regulations made thereunder; or

(12) As an insect repellent for personal use.

612-3. Offences.

Any person who contravenes any provision of this chapter is guilty of an offence and upon conviction, is liable to a fine or penalty provided for in the Provincial Offences Act.

2. This by-law comes into force on April 1, 2004. [page364]

History of the Municipal Act, 2001

[6] The Municipal Act, 2001 received royal assent on December 12, 2001 and came into force January 1, 2003. It was the first overhaul of the old Act and its predecessors in 150 years. The purpose of creating a new Act was to give municipalities "the tools they need to tackle the challenges of governing in the 21st century" (Ontario Legislative Assembly, Official Report of Debates (Hansard), 53 (18 October 2001) at 1350 (Hon. Chris Hodgson)), including more authority, accountability and flexibility so that municipal governments would be able to deliver services as they saw fit.

[7] One of the ways in which the new Act introduces more flexibility is by giving municipalities two kinds of powers. Part II of the new Act, for the first time, gives

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municipalities the power of a natural person (s. 8) and as well, ten broad "spheres of jurisdiction" (s. 11) within which municipal councils have wide discretion to enact by-laws. Part III of the new Act gives municipalities specifically defined by-law making powers, as under the old Act.

[8] Part II of the new Act is entitled "General Municipal Powers". That Part contains not only the two new general powers of a municipality in ss. 8 and 11, but also rules of interpretation. For example, s. 9(1) in Part II provides:

> 9(1) Sections 8 and 11 shall be interpreted broadly so as to confer broad authority on municipalities,
>
> (a) to enable them to govern their affairs as they consider appropriate; and
>
> (b) to enhance their ability to respond to municipal issues.

[9] Section 9(1) applies to the s. 11 spheres of jurisdiction contained in Part II, but also to s. 8, which is in Part II but gives municipalities the capacity and powers of a natural person for all purposes under the new Act. Similarly s. 14, which sets out a "conflicts rule" for determining the validity of by-laws that regulate matters already dealt with by federal or provincial legislation, is a rule of general application that applies to any by-law enacted by a municipality, not just to those by-laws enacted under one of the spheres of jurisdiction in Part II. Section 14 provides:

> 14. A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or
>
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation. [page365]

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[10] Part III of the new Act is entitled "Specific Municipal Powers". These include detailed powers to enact by-laws in areas such as highways, transportation, and waste management, although these are also named as spheres of jurisdiction under s. 11. In order to clarify the relationship between the spheres of jurisdiction powers and the specific powers enumerated in Part III, s. 15(1) in Part II provides:

> 15(1) If a municipality has power to pass a by-law under section 8 or 11 and also under a specific provision of this or any other Act, the power conferred by section 8 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision.

[11] Section 130, the provision at issue in this case, is one of the specific powers in Part III and provides:

> 130. A municipality may regulate matters not specifically provided for by this Act or any other Act for purposes related to the health, safety and well-being of the inhabitants of the municipality.

[12] The predecessor to this section, then numbered s. 102, was referred to under the old Municipal Act as the general welfare provision and read:

> 102. Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act and for governing the conduct of its members as may be deemed expedient and are not contrary to law.

[13] Section 130 was deliberately left as a specific power and not a sphere of jurisdiction when the new Act was created and passed. The language of the section was amended to remove the reference to morality and the conduct of municipal council members, and the term "welfare" was changed to "well-being". In addition, the words "not contrary to law" were removed, as that condition is now provided in s. 14 of the Act. Most importantly

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for the purposes of this case, the authority granted by s. 130 now excludes not just matters "specifically provided for by this Act" but also matters "specifically provided for by ... any other Act".

[14] It is common ground that the Municipal Act, 2001 contains no named specific power to make by-laws regarding the use of pesticides within a municipality, nor is there a sphere of jurisdiction that might encompass such a power. The appellant has two main arguments. First, it says that because s. 9(1) of the new Act directs a broad interpretation of the powers contained in the spheres of jurisdiction granted in Part II, the specific powers in Part III are to be interpreted narrowly. Consequently, the scope of the former general welfare power in s. 102 of the old Act has been pared down to what the appellant [page366] terms a "specific health power" with little or no scope, and certainly without scope to give the city the power to regulate pesticide use within the municipality.

[15] The appellant's second argument is that by the addition of the words "or any other Act" to the phrase "matters not specifically provided for by this Act", the effect of s. 130 is to prohibit any by-laws on matters the "pith and substance" of which are already the subject of legislation, whether federal or provincial. There is both federal and provincial legislation dealing with pesticides: in the case of the federal Pest Control Products Act, R.S.C. 1985, c. P-9 (the "PCPA"), with the importing, manufacturing, and labelling of pesticides; and in the case of the Ontario Pesticides Act, R.S.O. 1990, c. P.11, with the storage of pesticides and the licensing of commercial applicators and exterminators. The appellant characterizes both acts as legislation regulating the use of pesticides. Consequently, the appellant argues, a municipality cannot use s. 130 to enact any by-law that also regulates the use of pesticides.

Evolution of the Interpretation of the Scope of Municipal By-Law Making Authority

[16] Historically, the courts interpreted the powers of municipalities to enact by-laws restrictively. The rule they

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applied was known as "Dillon's Rule" (from the text, Dillon on Municipal Corporations, 4th ed.), which stated that "a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those powers essential to, and not merely convenient for, the effectuation of the purposes of the corporation": Stanley M. Makuch, Neil Craik and Signe B. Leisk, Canadian Municipal and Planning Law, 2nd ed. (Toronto: Thomson-Carswell, 2004) at p. 82. In Verdun (City) v. Sun Oil Co., [1952] 1 S.C.R. 222, [1952] 1 D.L.R. 529, Fauteux J. articulated the restrictive approach in this way at p. 228 S.C.R.: "That the municipalities derive their legislative powers from the provincial Legislature and must, consequently, frame their by-laws strictly within the scope delegated to them by the Legisl ature, are undisputed principles."

[17] However, in the 1990s the Supreme Court of Canada began to move away from Dillon's Rule. The court favoured instead a "benevolent construction" or "broad and purposive" approach that allowed for a more generous interpretation of municipal powers, with a view toward showing deference to, and respect for, the decisions of locally elected officials. [page367]

[18] The move began with the dissenting reasons of McLachlin J. (as she then was) in Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, [1994] S.C.J. No. 15, where she first identified a more liberal approach to the construction of enabling statutes that was already reflected in such cases as Hamilton (City) v. Hamilton Distillery Co. (1907), 38 S.C.R. 239; Howard v. Toronto (City) (1928), 61 O.L.R. 563, [1928] 1 D.L.R. 952 (C.A.); Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223, [1947] 2 All E.R. 680 (C.A.); and Kuchma v. Tache (Rural Municipality), [1945] S.C.R. 234, [1945] 2 D.L.R. 13. She then observed at p. 244 S.C.R.:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear

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demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in Greenbaum, [infra], and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

McLachlin J. concluded at p. 248 S.C.R.:

> It may be that, as jurisprudence accumulates, a threshold test for judicial intervention in municipal decisions will develop. For the purposes of the present case, however, I find it sufficient to suggest that judicial review of municipal decisions should be confined to clear cases. The elected members of council are discharging a statutory duty. The right to exercise that duty freely and in accordance with the perceived wishes of the people they represent is vital to local democracy. Consequently, courts should be reluctant to interfere with the decisions of municipal councils. Judicial intervention is warranted only where a municipality's exercise of its powers is clearly ultra vires, or where council has run afoul of one of the other accepted limits on municipal power.

[19] McLachlin J.'s broad and purposive approach to the interpretation of municipal statutes was subsequently adopted and approved by the Supreme Court in several cases, including Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342, [2000] S.C.J. No. 14; United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, [2004] S.C.J. No. 19; and Spraytech, supra.

[20] At the same time, some provinces, starting with Alberta and now including Ontario, began to enact broader and more flexible enabling statutes for their municipalities. The United Taxi case, supra, arose under Alberta's new Municipal Government Act, S.A. 1994, c. M-26.1, which, like the Ontario Municipal Act, 2001, incorporates the concept of spheres of

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jurisdiction. [page368] The issue in that case was whether the City of Calgary had the authority under Alberta's new Act to freeze the number of taxi licences it issued. Although he was dealing with the interpretation of broadly worded powers in the Act to pass by-laws to regulate transportation and licences, Bastarache J.'s discussion of the new broad and purposive interpretive approach was not confined to the new form of statute. He stated at para. 6:

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: Nanaimo, supra, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: The Municipal Act, S.M. 1996, c. 58, C.C.S.M. c. M255; Municipal Government Act, S.N.S. 1998, c. 18; Municipal Act , R.S.Y. 2002, c. 154; Municipal Act, 2001, S.O. 2001, c. 25; The Cities Act, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: Shell Canada, at pp. 238 and 245.

[21] Finally, in Spraytech, supra, the issue was whether the Town of Hudson, Quebec, had the authority to enact a by-law limiting the non-essential use of pesticides in the town. Section 410(1) of the province of Quebec's Cities and Towns Act, supra, read:

> 410. The council may make by-laws:
>
> (1) To secure peace, order, good government, health and

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> general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Qubec, nor inconsistent with any special provision of this Act or of the Charter;

[22] Writing for the majority of the Supreme Court, L'Heureux-Dub J. identified this section as a general welfare provision that supplements the specific grants of power in other sections, and stated the following about such provisions at para. 19:

> Section 410 C.T.A. is an example of such a general welfare provision and supplements the specific grants of power in s. 412. More open-ended or "omnibus" provisions such as s. 410 allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation. There are analogous provisions in other provinces' and territories' municipal enabling legislation: see Municipal Government Act, S.A. 1994, c. M-26.1, ss. 3(c) and 7; Local Government Act, R.S.B.C. 1996, c. 323, s. 249; Municipal Act, S.M. 1996, c. 58, C.C.S.M. c. M225, ss. 232 and 233; Municipalities Act, R.S.N.B. 1973, c. M-22, s. 190(2), [page369] First Schedule; Municipal Government Act, S.N.S. 1998, c. 18, s. 172; Cities, Towns and Villages Act, R.S.N.W.T. 1988, c. C-8, ss. 54 and 102; Municipal Act, R.S.O. 1990, c. M.45, s. 102; Municipal Act, R.S.Y. 1986, c. 119, s. 271.

[23] In assessing whether the general welfare power in the Quebec Cities and Towns Act empowered the Town of Hudson to enact its pesticide by-law, L'Heureux-Dub J. first examined whether there was a specific by-law making power that the town should have used and concluded that there was not, an exercise mandated by the court's 1993 decision in R. v. Greenbaum, [1993] 1 S.C.R. 674, [1993] S.C.J. No. 24.

[24] Having concluded that there was no specific power in the Quebec's Cities and Towns Act that would allow the town to enact a pesticide control by-law, L'Heureux-Dub J. had to determine whether the town could use the general welfare power

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to enact such a by-law. To interpret the general welfare power, she first turned to the Nanaimo case, supra, where the court had approved McLachlin J.'s view in Shell Canada advocating the benevolent construction approach to the implication of municipal powers that are not expressly conferred. L'Heureux-Dub J. also referred to Sopinka J.'s majority judgment in Shell Canada, which enunciated the test that the municipal enactment had to have been "passed for a municipal purpose". L'Heureux-Dub J. then quoted the following passage from Greenbaum, supra, at p. 689 S.C.R.:

> Municipal by-laws are to be read to fit within the parameters of the empowering provincial statute where the by-laws are susceptible to more than one interpretation. However, courts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing ultra vires by-laws.

[25] Applying these principles from Nanaimo, Shell Canada and Greenbaum, L'Heureux-Dub J. examined the purpose of the Town of Hudson's pesticide by-law. She concluded that its purpose was to address the concerns of the town's inhabitants about the health risks arising from the non-essential use of pesticides and to minimize those risks. That purpose fell "squarely within the 'health' component" of the general welfare power.

[26] L'Heureux-Dub J. also observed that to read the general welfare provision to permit the pesticide by-law accords with international law and policy and with the "precautionary principle". She referred to the definition in para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990) as follows:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty [page370] should not be used as a reason for postponing measures to prevent environmental degradation.

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[27] Canada had advocated including this principle during the Bergen Conference, and has codified it in several pieces of federal legislation. L'Heureux-Dub J. concluded that the town's concerns about pesticides fit within the precautionary principle's rubric of preventative action.

[28] Finally, having concluded that the Town of Hudson had the authority to enact its pesticide by-law, L'Heureux-Dub J. had to decide whether the by-law was inoperative because of a conflict with federal or provincial legislation regulating pesticides, i.e., the federal PCPA or the Quebec Pesticides Act, R.S.Q., c. P-9.3. L'Heureux-Dub J. applied the "impossibility of dual compliance" test from Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, under which a provincial law is invalidated if compliance with it would result in the breach of a federal law. Looking first at the federal PCPA, L'Heureux-Dub J. described it as regulating and authorizing the import, export, sale, manufacture, packaging, and labelling of pesticides, as well as their registration for use in Canada. L'Heureux-Dub J. concluded that there was no operational conflict between the federal PCPA and the Town of Hudson's pesticide by-law, because it was not impossible to comply with both. She also found that the application of the by-law would not frustrate or displace the legislative purpose of Parliament [See Note 1 at the end of the document].

[29] Turning to the Quebec Pesticides Act, L'Heureux-Dub J. found that it established a permit and licensing system for vendors and commercial applicators of pesticides. She noted that the provincial legislation complemented the focus of the federal PCPA, which is on the products themselves. She concluded, importantly, that "[a]long with By-law 270, these laws establish a tri-level regulatory regime" (para. 39). She found that there was neither a problem with dual compliance with Quebec's Pesticides Act and the Town of Hudson's pesticide by-law, nor any "plausible evidence that the legislature intended to preclude [page371] municipal regulation of pesticide use". In the result, the Supreme Court upheld the by-law.

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The Issues

(1) Did the motion judge err in applying the broad and purposive approach to the interpretation of s. 130, when that section is not one of the spheres of jurisdiction in Part II of Ontario's Municipal Act, 2001 but is a specific power under Part III?

(2) What is the proper interpretation of the limitation that s. 130 can only be used to enact by-laws related to "matters not specifically provided for by this Act or any other Act"?

(3) Do the words "matters not specifically provided for by this Act or any other Act" require a comparison with legislation enacted by the other levels of government, either through an application of the "impossibility of dual compliance" test, or of a test focusing on the pith and substance of the potentially conflicting legislation?

(4) Does the precautionary principle apply to the interpretation of the by-law making power in s. 130?

(1) The proper interpretive approach

[30] In his discussion of the proper interpretation of s. 130, the motion judge applied the broad and purposive approach that I have discussed above. The appellant contends that the motion judge erred in so doing.

[31] The appellant submits that, through its structure and, more particularly, through the interpretive provision in s. 9(1), the Municipal Act, 2001 adopts the broad and purposive approach for the interpretation of the spheres of jurisdiction in Part II, but not for the specific powers in Part III. By applying the generous approach to the interpretation of s. 130, which is found in Part III, the motion judge effectively elevated the general welfare power (which, as noted, the appellant refers to as the "specific health power") to a sphere of jurisdiction, contrary to the purport of the new Act.

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[32] I do not agree with this submission, based on my reading of the language of the new Act and on the development of the new approach to the interpretation of municipal by-law making powers, which I have canvassed above.

[33] Although s. 9(1) is contained in Part II of the new Act and expressly requires a broad interpretation of the s. 11 spheres of [page372] jurisdiction, it imposes the same requirement for the interpretation of s. 8, the natural person power, which is found in Part II but applies to the entire Act [See Note 2 at the end of the document]. Also, s. 9(1) contains no language that suggests that the broad approach is to be limited to the interpretation of the spheres of jurisdiction and is not to be applied when interpreting other parts or sections of the new Act. In light of the development of the jurisprudence in this area over the last 12 years and the clear adoption by the Supreme Court of a generous approach that accords deference to municipal governments, it would take clear legislative language to return to Dillon's Rule when interpreting those parts of the new Act not contained in Part II: see United Taxi, supra, at para. 11.

[34] Furthermore, it would be a retrograde step to apply the former, restrictive approach to interpret the balance of the Municipal Act, 2001 outside Part II, when the goal of modernizing the Act, as stated by the Minister of Municipal Affairs at the time, was to give municipalities in Ontario the "the tools they need to tackle the challenges of governing in the 21st century".

[35] As I discussed above, in the United Taxi case, Bastarache J. did not limit the application of the new approach to the interpretation of powers granted in spheres of jurisdiction. It is also useful to refer to the concurring reasons of LeBel J. in the Spraytech case. He viewed the question in that case to be an administrative law issue applied to the field of municipal governance. In his view, the restrictive interpretation urged by the appellants in that case would have made the general welfare section "an empty shell". The following is his analysis at paras. 53 and 54:

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The case at bar raises a different issue: absent a specific grant of power, does a general welfare provision like s. 410(1) authorize By-law 270? A provision like s. 410(1) must be given some meaning. It reflects the reality that the legislature and its drafters cannot foresee every particular situation. It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unforeseen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community living within their territory. Nevertheless, such a provision cannot be construed as an open and unlimited grant of provincial powers. It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In [page373] Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, the Court emphasized the local ambit of such power. It does not allow local governments and communities to exercise powers in questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously (see F. Hoehn, Municipalities and Canadian Law: Defining the Authority of Local Governments (1996), at pp. 17-24).

In the present case, the subject matter of the by-law lies within the ambit of normal local government activities. It concerns the use and protection of the local environment within the community. The regulation targets problems of use of land and property, and addresses neighbourhood concerns that have always been within the realm of local government activity. Thus, the by-law was properly authorized by s. 410(1).

(Original emphasis)

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[36] Relying on Toronto (City) v. Goldlist Properties (2003), 67 O.R. (3d) 441, [2003] O.J. No. 3931 (C.A.), at p. 461 O.R., the appellant points to aspects of the legislative history to support its narrow reading of s.130, including the fact that there was consideration given to including "health, safety and well-being of people and protection of property", as well as "the natural environment" as spheres of jurisdiction in Part II, but ultimately that was not done [See Note 3 at the end of the document]. There is also some equivocal discussion in Hansard from when the legislation was before the Standing Committee on General Government about whether the Spraytech decision would apply under the new Act. However, in his 2001/02 Report to the legislature, Ontario's Environmental Commissioner gave the opinion that s. 130 could be viewed as authorizing municipalities to enact pesticide by-laws to protect the health, safety and well-being of their inhabitants. In my view, the legislative history in this case is of little assistance to this court. The fact that s. 130 remains a specific power in Part III of the new Act does not exempt it from the modern interpretive rules discussed above.

[37] I conclude that absent an express direction to the contrary in the Municipal Act, 2001, which is not there, the jurisprudence from the Supreme Court is clear that municipal powers, including general welfare powers, are to be interpreted broadly and generously within their context and statutory limits, to achieve the legitimate interests of the municipality and its inhabitants. [page374] The trial judge did not err by adopting this approach to the general welfare power in s. 130.

(2) Interpreting the phrase "matters not specifically provided for in this Act or any other Act"

[38] In Spraytech, supra, a pesticide by-law with very similar aims and objectives was found to be within the ambit of the general welfare power in s. 410(1) of the Cities and Towns Act, which was the province of Quebec's counterpart to s. 102 of the old Ontario Municipal Act. The question, then, is: Does the wording of s. 130 of the new Act, properly interpreted, make the result in Spraytech inapplicable to the case at bar? To answer that question, I must consider the differences

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between s. 130 and its predecessor provision.

[39] Section 102 of the old Municipal Act provided:

> 102. Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act [. . .] as may be deemed expedient and are not contrary to law.

(Emphasis added)

[40] The appellant acknowledges that, as it was worded in s. 102, the phrase "in matters not specifically provided for by this Act" articulated a "rule against circumvention". That is, the phrase articulated a rule prohibiting a municipality from making by-laws using the s. 102 general welfare power to circumvent restrictions on its ability to enact by-laws regarding a particular subject matter, contained in specific powers in other parts of the old Act. To formulate a simple example, if a specific provision elsewhere in the old Municipal Act provided that a municipality could pass by-laws related to pool safety, but not height limits for diving boards, a municipality could not then pass a by-law purporting to limit the height of diving boards under s. 102.

[41] Another example of this rule can be found in the Supreme Court decision in Greenbaum. In that case, the court held that Metropolitan Toronto could not use its general welfare power in s. 102 of the old Municipal Act to enact a by-law prohibiting the sale of goods on Metro sidewalks except to licensed owners or occupiers of abutting property. The court's reasoning was that there were other specific sections of the old Act that authorized by-laws for the purposes of controlling sidewalk obstructions, street vending and public nuisances. If those specific powers did not give Metro the authority to enact the impugned by-law, then the municipality could not find that authority in the general welfare section. [page375]

[42] The appellant submits that the rule against circumvention is now codified in Part II of the Municipal Act,

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2001 in s. 15(1), which by its terms, relates only to ss. 8 and 11. Section 15(1) provides:

> 15(1) If a municipality has power to pass a by-law under section 8 or 11 and also under a specific provision of this or any other Act, the power conferred by section 8 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision.

[43] The appellant argues that the words in s. 130 that provided for the rule against circumvention in the old s. 102, must now have a different meaning, since the only rule against circumvention in the new Act is in s. 15(1).

[44] The appellant also submits that the addition of the words "or any other Act" to the words "matters not specifically provided for by this Act" indicates a change in meaning. The appellant says that the phrase that was the rule against circumvention of more restrictive by-law making powers elsewhere in the Act now means that where the subject matter of the by-law is already the subject of federal or provincial legislation, the municipality is precluded from legislating in respect of that subject matter. I will discuss this argument when dealing with issue (3), below.

[45] The City's position is that the phrase "matters not specifically provided for by this Act or any other Act" in s. 130 is an extended version of the rule against circumvention from the old Act. The motion judge agreed with this interpretation and so do I. I do so for three reasons.

[46] The first is that the legislature has repeated the same phrase from the former s. 102, merely adding the four additional words "or any other Act". Citing Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) at p. 395, Bastarache J. in United Taxi, supra, at para. 11, stated: "It is well established that the legislature is presumed not to alter the law by implication ... Rather, where it intends to depart from prevailing law, the legislature will do so expressly." The

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use in s. 130 of language identical to s. 102, with the addition of the words "or any other Act", is not enough to signal a change in meaning. Rather, it simply indicates an extension of the same rule against circumvention that existed in the old Municipal Act to by-law making powers granted to municipalities in acts other than the Municipal Act, 2001.

[47] Consistent with this interpretation, the respondent points out that with the passage of the new Act, the legislature transferred some by-law making powers out of the old Municipal Act into other provincial acts such as the Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4, s. 7.1, and the Fluoridation Act, R.S.O. 1990, c. F.22, s. 2.1. [page376] See Municipal Act, 2001, supra, at ss. 475, 476. Some of these powers may well relate to matters of health and safety.

[48] Second, I reject the appellant's argument that s. 15(1) is the only "rule against circumvention" in the new Act, and that therefore the court must adopt a radically different interpretation of the limiting words in s. 130. The purpose of s. 15(1) is to ensure that, where the spheres of jurisdiction in s. 11 or the natural person powers in s. 8 overlap with any specific power in Part III, the procedural or other restrictions in the specific power will be respected. There is no indication that this section in any way replaces the limitation that has always been part of the general welfare power. If the appellant's argument were correct, it would mean that there no longer is any language in s. 130 that specifically addresses how the general welfare power is to be interpreted in relation to other powers in the Act. Again, that would represent a significant and unworkable shift in the meaning of s. 130, when compared to the interpretation given to s. 102 of the old Municipal Act by Iacobucci J. in Greenbaum, supra.

[49] Third, the clearest and most logical interpretation of the phrase "matters not specifically provided for in this Act or any other Act" is its historical meaning, which is the rule against circumvention. It is to be noted that this rule goes back at least as far as the 1937 case of Morrison v. Kingston

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(City), [1938] O.R. 21, 69 C.C.C. 251 (C.A.), which was cited by Iacobucci J. in Greenbaum, supra. In Morrison, Middleton J.A. interpreted essentially the same language as follows (at p. 26 O.R., p. 255 C.C.C.):

> A third limitation is, I think, to be found in the express enactments of the Municipal Act. Very few subjects falling within the ambit of local government are left to the general provisions of sec. 259 [the general welfare power at that time]. Almost every conceivable subject proper to be dealt with by a municipal council is specifically enumerated in the detailed provisions in the Act, and in some instances there are distinct limitations imposed on the powers of the municipal council. These express powers are, I think, taken out of any power included in the general grant of power by sec. 259.

[50] In other words, previously, when there was no other specifically related by-law making power elsewhere within the old Municipal Act, then a matter could be made the subject of a by-law under s. 102 or its predecessors. Under s. 130 of the Municipal Act, 2001, a matter can be regulated by by-law so long as there is no other specifically related by-law making power elsewhere in the new Act or in any other Act.

(4) Is the by-law in conflict with federal or provincial legislation?

[51] The other significant change in s. 130 is the removal of the requirement in s. 102 of the old Act that the by-laws not be "contrary [page377] to law", under which a by-law would not be effective in the event of a conflict with a federal or provincial law. This requirement is now set out in s. 14 of the new Act, which I repeat here for ease of reference:

> 14. A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or

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(b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

[52] The appellant acknowledges that s. 14 applies to by-laws made under Part III, including under s. 130, as well as Part II of the new Act, and that s. 14 represents a codification of the "impossibility of dual compliance" conflicts test articulated and applied by L'Heureux-Dub J. in Spraytech, supra. The appellant also concedes that the City of Toronto's pesticide by-law meets that test. It is not impossible to comply with the city's pesticide by-law and at the same time to comply with the requirements of the federal PCPA or the Ontario Pesticides Act.

[53] The appellant says, however, that the conflicts test from Spraytech, supra, is not relevant for the purposes of s. 130. In other words, the fact that dual (in fact, triple) compliance is possible is not determinative in this case. Again, the appellant points to the words "matters not specifically provided for by this Act or any other Act" in s. 130. The appellant says that because the "impossibility of dual compliance" conflicts rule is articulated in s. 14, the words in s. 130 cannot be a reference to the same conflicts rule, but must have another meaning. Moreover, as discussed under issue (2) above, because of the addition of the words "or any other Act", the phrase is no longer a reference to the rule against circumvention.

[54] The appellant's position is that the effect of the language of s. 130 is that a municipality only has the power to enact a by-law for health, safety or well-being where the subject matter of the by-law in pith and substance is not specifically provided for in any other Act. The appellant says that the federal PCPA and the Ontario Pesticides Act together form a comprehensive regime for the regulation of pesticides, with a view to the protection of health and the environment. Therefore, the subject matter is provided for in other legislation, causing the by-law to be ultra vires. Stated another way, the appellant says that the proper approach is to determine the pith and substance of the by-law, then to see if

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there is any other legislation dealing with the same pith and substance. If there is, the by-law is invalid. A central implication of [page378] the appellant's position is that, contrary to the approach endorsed by L'Heureux-Dub J. in Spraytech, s. 130 of the Municipal Act, 2001 precludes municipalities in Ontario from participating in a tri-level regime to regulate the use of pesticides, where each level of government plays a role in the regulatory scheme.

[55] Both in its factum and in oral argument, the appellant developed a detailed examination of the federal PCPA and of the Ontario Pesticides Act. The appellant sought to show that, although they deal in the case of the PCPA with such issues as registering and labelling pesticide products, and in the case of the Pesticides Act with the licensing of pesticide contractors, the true "matter" of those Acts is the protection of human health through restrictions on the use of registered pesticides. Since this is also the "matter" of the by-law, the appellant argues that the pesticide by-law is ultra vires the City of Toronto. In my view, the position of the appellant is without merit and must be rejected.

[56] As I stated in the discussion of issue (2), above, as a matter of statutory interpretation there is no basis to read the phrase "matters not specifically provided for by this Act or any other Act" other than in accordance with Iacobucci J.'s interpretation from Greenbaum, supra. The phrase is a mere restatement, and modest extension, of the traditional rule against circumvention. This reading gives the provision a pragmatic and workable meaning; it is consistent with the accepted interpretation of those words in previous incarnations of the Municipal Act; and there is nothing in the language used to indicate that the legislature intended that a new and different meaning be given to the phrase. Had the legislature wanted such a drastic change, it would have used very clear language to communicate that intention: United Taxi, supra, at para. 11.

[57] Once it is accepted that the words "matters not specifically provided for by this Act or any other Act" is merely a rule against circumvention referring to other specific

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municipal by-law making powers, the appellant's argument collapses.

[58] Regardless, the appellant's proposed interpretation is one that would have to be clearly intended and expressed by the legislature because its effect would be to turn the "impossibility of dual compliance" conflicts rule from Multiple Access, supra, and Spraytech, supra, on its head. It would reintroduce the approach to paramountcy, long since rejected in Canada, that legislation by one level of government occupies the field and precludes complementary legislation by other levels: see Peter W. Hogg, Constitutional Law of Canada, 4th ed., looseleaf (Scarborough, Ont.: Thomson-Carswell, 1997) at pp. 16-7 to 16-13. Moreover, the [page379] validity of tri-level regulation, which the appellant's position repudiates, has been unambiguously endorsed by the Supreme Court of Canada in Spraytech, supra, at para. 39, as the accepted model in our federal system.

[59] The most recent discussion by the Supreme Court of the conflicts rule and the doctrine of paramountcy is in Major J.'s decision in Rothmans, Benson & Hedges Inc. v. Saskatchewan, supra. The issue in that case was whether s. 30 of the federal Tobacco Act, S.C. 1997, c. 13, rendered s. 6 of the Saskatchewan Tobacco Control Act, S.S. 2001, c. T-14.1 inoperative, based on the doctrine of paramountcy. Section 30 of the federal Act permits the retail display of tobacco products or accessories as an exception to a prohibition of the promotion of tobacco products contained in s. 19 of the same Act. Section 6 of the Saskatchewan Act bans all advertising and promotion of tobacco products in any place where persons under 18 are allowed.

[60] In Rothmans, Major J., writing for the court, set out at para. 15 a two-part test to determine whether a provincial provision is so inconsistent with a federal provision that the paramountcy doctrine renders it inoperative: (1) can a person simultaneously comply with both provisions? (the impossibility of dual compliance test); and (2) does the provincial provision frustrate Parliament's purpose in enacting the federal provision? Major J. concluded that a person could comply with

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both s. 6 of the Saskatchewan Tobacco Control Act and s. 30 of the federal Tobacco Act. The federal Act did not grant a positive right to advertise tobacco products. Although the federal government's constitutional jurisdiction to legislate in the area came from its criminal law power, the purpose of the Act was to promote public health and to protect young persons by restricting access to tobacco. Major J. observed that a provision enacted in the prohibitory context would not ordinarily create a freestanding right. Indeed, such a right would be inconsistent with the stated purpose of the Act.

[61] Major J. at para. 21 specifically rejected the suggestion that Parliament intended to occupy the field with respect to the regulation of the retail display of tobacco products: "In my view, to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least O'Grady [O'Grady v. Sparling, [1960] S.C.R. 804, 25 D.L.R. (2d) 145], at p. 820 S.C.R." He also found that the more stringent provincial prohibition on the retail display of tobacco products enhanced rather than frustrated the legislative purpose of the federal Act. [page380]

[62] The Rothmans case is the latest in the series of cases from the Supreme Court that explains how different levels of government may legislate in related or overlapping fields. The only restrictions on this co-operative view of federalism are that the legislative provisions may not expressly conflict, and the legislation of the lower levels of government may not frustrate the legislative purpose of the more senior level of government.

[63] Applying these principles to the issues in this case, the conflicts test explicitly provided in s. 14 of the Municipal Act, 2001 must be interpreted in accordance with the two-pronged test prescribed in Rothmans: (1) Is it impossible to comply simultaneously with the pesticide by-law and with the federal PCPA or the Ontario Pesticides Act?; (2) Does the by-law frustrate the purpose of Parliament or the Ontario

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legislature in enacting those laws? If the answer to both questions is "no", then the by-law is effective.

[64] Using Major J.'s analysis, had either Parliament or the Ontario legislature intended to occupy the field of pesticide regulation with the federal PCPA or the provincial Pesticides Act, they would have used very clear language to say so. Furthermore, had the Ontario legislature intended to prevent municipalities in Ontario from having the authority to enact by-laws limiting the use of pesticides following the Supreme Court's decision in Spraytech, it could have done so explicitly either in the Municipal Act, 2001, which was enacted after the Spraytech decision, or by including a provision prohibiting municipalities from enacting pesticide by-laws in the provincial Pesticides Act [See Note 4 at the end of the document].

[65] The appellant concedes it that it is possible to comply with the City of Toronto's pesticide by-law, the federal PCPA, and the Ontario Pesticides Act at the same time. However, in subsequent submissions, the appellant took the position that the pesticide by-law contravenes the second part of the test from Rothmans, suggesting that it frustrates the purpose of the federal pesticide regime, which the appellant says is to make pesticides available for use by the public.

[66] The appellant also refers to the new federal Pest Control Products Act, 2002, c. 28, which has been passed but is not yet in force. The preamble to that Act states that, "[P]est control products of acceptable risk and value can contribute significantly to the attainment of the goals of sustainable pest management." [page381] The appellant says that the by-law deprives residents of Toronto of the benefits of the pesticides that are regulated by the PCPA but are restricted or prohibited by the by-law.

[67] In my view, this argument has been addressed and determined by the Supreme Court in Spraytech, supra. There the court held that the Town of Hudson's pesticide by-law would not frustrate the purpose of the old federal PCPA, which, like the new federal Act, is permissive only. Its purpose is to make

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certain pesticides available by regulating their manufacture and labelling, but it does not require that everyone be able to use every regulated product in an unrestricted way.

(4) The role of the precautionary principle

[68] In Spraytech, supra, after concluding that s. 410(1), the general welfare provision of the province of Quebec's Cities and Towns Act, gave the Town of Hudson statutory authority to enact its pesticide by-law, L'Heureux-Dub J. noted that reading the section in that way was consistent with the precautionary principle (see para. 26 above). Since Spraytech, the precautionary principle has been referred to in two appellate decisions, but in neither case was it determinative: R. v. Kingston (City) (2004), 70 O.R. (3d) 577, [2004] O.J. No. 1940 (C.A.), at para. 86; Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District), [2003] B.C.J. No. 1581, 15 B.C.L.R. (4th) 229 (C.A.), at para. 80.

[69] In this case, the third paragraph of the preamble to the City of Toronto's pesticide by-law invokes the precautionary principle. However, in his decision, the motion judge did not discuss the principle, although he did address the appellant's submission about alleged deficiencies with the city's scientific evidence supporting the by-law. He concluded that the court was not in a position to judge the sufficiency of the city's research. However, he found that Dr. Sheela Basrur, then the city's medical officer of health, had made substantial inquiries and reviewed numerous reports and publications to assess whether the by-law would protect the health of Toronto's citizens.

[70] The appellant submits that it is not appropriate for the city to seek to support its pesticide by-law based on the precautionary principle for two reasons: (1) It says the city conducted no meaningful assessment of the by-law's impact, which assessment is necessary to rely on the precautionary principle; [and] (2) The precautionary principle cannot be used to confer power where there is none.

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[71] I agree that if there was no credible research basis for enacting the by-law, and if the municipality did not otherwise [page382] have the power to enact the by-law, the precautionary principle could not be used as authority for upholding the effectiveness of the by-law. However, that is not the case here. As the motion judge did not rely on the precautionary principle to support his conclusions, there is no need for this court to address the issue further on this appeal.

Summary

[72] The motion judge found that the by-law is aimed primarily at the matters of health, safety and well-being of the City of Toronto's inhabitants. Its municipal purpose therefore falls squarely within the authority granted by s. 130 of the Municipal Act, 2001.

[73] No by-law can be enacted under s. 130 to regulate matters of health, safety or well-being of the inhabitants of the city if the purpose of the by-law is to regulate a "matter that is specifically provided for by this Act or any other Act". These limiting words require the court to examine the Municipal Act, 2001 and other provincial Acts to determine if they give municipalities any specific powers to regulate the use of pesticides. If so, no such by-law can be enacted using s. 130. There is no dispute that there is no specific municipal power to regulate pesticide use contained in the Municipal Act, 2001 or in any other Ontario statute. Therefore, the limiting words of s. 130 do not preclude enactment of the pesticide by-law.

[74] Finally, the by-law will not be effective if it expressly contradicts any other law, whether federal or provincial, or if it frustrates the purpose of those laws. The appellant concedes that it is not impossible to comply with the pesticide by-law at the same time as the federal PCPA or the Ontario Pesticides Act. Moreover, as I have found, the pesticide by-law does not frustrate the purpose of those Acts. Therefore, the by-law is not rendered inoperative by the conflicts test in s. 14 of the Municipal Act, 2001, applied in

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accordance with the Supreme Court's decisions in Spraytech and Rothmans, supra.

Conclusion

[75] As I have concluded that the city had the authority to pass the by-law under s. 130 of the Municipal Act, 2001, I would dismiss the appeal with costs payable by the appellant to the respondent in the amount of $50,000. No costs to the intervenors, as agreed.

Appeal dismissed. [page383]

Notes

Note 1: This second prong of the conflicts test, focusing on purpose, was recently strengthened by the Supreme Court of Canada in Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, [2005] S.C.J. No. 1, 2005 SCC 13. Rothmans made clear that in any paramountcy case, a court must ask two questions: (1) can a person simultaneously comply with the provincial and the federal legislation? and (2) does the provincial legislation frustrate the purpose of the federal legislation? As Rothmans was released while the decision of this court was under reserve, counsel were given the opportunity to make written submissions on its effect, if any, for the purpose of this appeal.

Note 2: Section 8 provides:

> 8. A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.

Note 3: I have set out the wording of these two spheres of jurisdiction in accordance with the appellant's submissions, to which the respondents did not object. The fact that these spheres were once considered is confirmed by a 1998 government consultation document: Ministry of Municipal Affairs and Housing, A Proposed New Municipal Act: Draft Legislation, Including Explanatory Notes (Consultation Document) (Queen's

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Printer for Ontario, 1998) at iii-iv.

Note 4: As it did, for example, in s. 20 of the Milk Act, R.S.O. 1990, c. M. 12, which states: "Despite this or any other Act, no council of a local municipality shall by by-law require that fluid milk products sold in the municipality be produced or processed in the municipality or in any other designated area."

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TAB 23

JOHNSON COUNTY, IOWA, Appellee v. GUERNSEY ASSOCIATION OF JOHNSON COUNTY, IOWA, INC., Appellant

No. 56796

Supreme Court of Iowa

232 N.W.2d 84; 1975 Iowa Sup. LEXIS 1160

July 31, 1975, Filed

PRIOR HISTORY: [1]** Appeal from Johnson District Court. Harold D. Vietor. Defendant appeals from decree enjoining it from selling unpasteurized milk to any final consumer.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant corporation challenged an order of the Johnson District Court (Iowa), which enjoined the corporation from selling unpasteurized milk to any final consumer. The sale of unpasteurized milk for human consumption to the final consumer violated Code § 192.11. The corporation alleged it distributed milk only to its members.

OVERVIEW: The corporation was a non-profit corporation. One of its stated purposes was to provide a source of milk from Golden Guernsey cows for its members. To pay for the care of the herd, each member was assessed a fee based on his consumption of the corporation's dairy products. Members paid a sum for each gallon taken. The trial court ruled the corporation's distribution of unpasteurized milk to its members constituted a sale prohibited by § 192.11. The court agreed. The corporation argued a sale did not take place as title to the milk was at all times in the members of the corporation. The court ruled that the property of a corporation was not the property of the individual stockholders. Thus, the corporation's distribution of milk to its members was a transfer of title to property for a fixed price. The corporation also argued that § 192.11 was not intended to prohibit the distribution of milk involved in this case. The court ruled that § 192.11 was enacted to protect the public health. The statute prohibited sales of unpasteurized milk to the "final consumer." The members of the corporation were final consumers within the meaning of § 192.11. Thus, the injunction was proper.

OUTCOME: The court affirmed the judgment.

CORE TERMS: milk, unpasteurized, consumer, pasteurized milk, statutory construction, stockholder, bacterial, corporate property, distributed, equitable, enjoined, fiction, lease, herd, cows, milliliter, dairies, shares of stock, consumption, non-profit, liberally, selling, cattle, grade, dairy products, maximum

LexisNexis(R) Headnotes

Governments > Agriculture & Food > Product Quality
[HN1] See Code § 192.11 (Iowa).

Governments > Agriculture & Food > Product Quality
[HN2] See Code § 192.32 (Iowa).

Governments > Agriculture & Food > Processing, Storage & Distribution
Governments > Agriculture & Food > Product Promotion
[HN3] See Code § 192A.1(9) (Iowa).

Business & Corporate Law > Corporations > Finance > Dividends & Reacquisition of Shares > General Overview
Business & Corporate Law > Corporations > Formation > Corporate Existence, Powers & Purpose > General Overview
Business & Corporate Law > Corporations > Shareholders > Shareholder Duties & Liabilities > General Overview
[HN4] The doctrines are fundamental and familiar that the corporation itself is a legal personality, and holds the full title, legal and equitable, to all corporate property. Stockholders, individually and separately, hold the full title, legal and equitable, to their respective shares of stock. A stockholder does not, by virtue of his stock, acquire any estate, legal or equitable, in the corporate property; he obtains only a right to participate in the lawful dividends while the corporation is in being, and to his proportionate share of the net assets upon its dissolution and final settlement.

Business & Corporate Law > Corporations > Formation > Corporate Existence, Powers & Purpose > General Overview
Business & Corporate Law > Corporations > Shareholders > Shareholder Duties & Liabilities > General Overview
[HN5] It is well settled that the property of a corporation is not the property of the individual stockholders.

Governments > Legislation > Interpretation
[HN6] Many rules of statutory construction have evolved. With one exception none of them is to be used to the exclusion of the others and all must be applied together in the light of the particular facts of the case then under examination. The single departure from this relates to the polestar of all statutory construction - the search for the true intention of the legislature. The other interpretative guides are all designed, in one way or another, to help reach that goal. Previous holdings also

establish the following general guidelines: (1) in considering legislative enactments, a reviewing court should avoid strained, impractical or absurd results; (2) ordinarily, the usual and ordinary meaning is to be given the language used but the manifest intent of the legislature will prevail over the literal import of the words used; (3) where language is clear and plain, there is no room for construction; (4) a reviewing court should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it; (5) all parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion.

Governments > Legislation > Interpretation
[HN7] A law providing regulations conducive to the public good and welfare is ordinarily remedial, and as such liberally interpreted.

Governments > Agriculture & Food > Product Quality
Governments > Legislation > Interpretation
[HN8] Section 192.11 (Iowa) is a statute enacted to protect public health, and as such must be construed liberally to effect its purpose. The statute prohibits sales of unpasteurized milk to the "final consumer."

COUNSEL: Honohan, Epley & Lyon, of Iowa City, for Appellant.

J. Patrick White, Assistant County Attorney, for Appellee.

JUDGES: Moore, C.J., Mason, Rawlings, LeGrand and McCormick, JJ.

OPINION BY: MOORE

OPINION

[*84] Defendant Guernsey Association of Johnson County, Iowa, Inc., appeals from trial court's order enjoining it from selling unpasteurized **[*85]** milk to any final consumer, including its own members.

Plaintiff Johnson County on March 31, 1972 filed its petition asking that defendant be permanently enjoined and restrained from distributing non-pasteurized milk for human consumption, in violation of Code chapter 192. Defendant's answer denied selling unpasteurized milk to the final consumer as prohibited by Code section 192.11, alleging it distributed milk only to its members.

On trial to the court, August 8, 1973, most of the evidence was stipulated. Little, if any, factual dispute is involved in this appeal. Defendant is a non-profit corporation organized by Eldon and C. E. Moss under the Iowa Non-Profit **[**2]** Corporation Act, Chapter 504A of the 1973 Code of Iowa. One of defendant's stated purposes is to provide a source of milk from Golden Guernsey cows for its members. The corporation by its officers and directors entered into an agreement with Eldon

and C. E. Moss to lease from them their herd of Guernsey cattle. It included a provision all milk produced by the cows would be the property of the corporation. Eldon Moss entered into an agreement for the care of the leased herd.

To pay the cost of leasing and care of the herd each member was assessed a fee based on his consumption of the corporation's dairy products. Unpasteurized milk was distributed at the corporation's milk house. Pursuant to the corporate by-laws milk was not available to nonmembers. Members deposited $.87 for each gallon taken, making their own change from the corporation's funds at the milk house. Milk not distributed to members was sold to dairies.

To become a member of the corporation one had to pay a $1.00 membership fee and have an understanding of the objects and purposes of the corporation. There were about 450 members of the corporation at trial time. Five members testified they joined the corporation **[**3]** because they believed unpasteurized milk to be superior to pasteurized milk.

The corporation's milk was regularly tested by both the operator Eldon Moss and a professional testing service recognized by the State of Iowa. Tests revealed the milk produced by the corporation was maintained at a standard maximum bacterial count of 50,000 per milliliter. For delivery to dairies the state requirement is a maximum bacterial count of 100,000 per milliliter. Code section 192.19. Thus the corporation's milk betters the bacterial requirements for milk delivered to dairies. However, the corporation's milk fails to meet the State's 20,000 per milliliter bacterial limit for Grade "A" pasteurized milk. Code section 192.19.

The trial court found defendant's distribution of unpasteurized milk to its members constituted a sale prohibited by section 192.11. The court cited Code section 192A.1(9); Code section 422.42(2) and section 554.2106 of the Uniform Commercial Code, Code 1973. The court enjoined defendant from further such sales as authorized by section 192.32.

Defendant-appellant states the issue on this appeal as: "Does the distribution of unpasteurized milk by defendant to its members constitute **[**4]** a sale prohibited by section 192.11 of the Code of Iowa."

Code section 192.11 in pertinent part provides:

> [HN1] "Only grade 'A' pasteurized milk and milk products shall be sold to the final consumer, * * *."

Code section 192.32 provides:

> [HN2] "Any person who shall violate any of the provisions of chapters 190, 191 and 192 may be enjoined from continuing such violations. Each day upon which such a violation occurs shall constitute a separate violation."

As part of the chapter dealing with marketing of dairy products this definition is set out; [HN3] "'Sale' or 'sell' means and includes any commercial transfer for consideration, exchange, barter, gift,

or offer for sale and **[*86]** distribution in any manner or by any means." Section 192A.1(9).

Practically the same definition is found in Code section 422.42(2) in reference to sales tax and in Code section 554.2106(1), a part of the Uniform Commercial Code. A similar definition of "sale" is approved in *Baird v. City of Webster City*, 256 Iowa 1097, 1109, 130 N.W.2d 432, 439.

I. Defendant-appellant first argues a sale did not take place as title to the milk was at all times in the members of the corporation. Its first hurdle **[**5]** is this provision in its lease of the Moss cattle: "7. All milk produced by the original cows, replacements therefor, supplied by the Lessor, and the progeny of either during the term of this Lease shall belong to the Lessee."

Next defendant is confronted with the prevailing view that the corporation, not the members or shareholders, holds title to corporate property.

In *Dawson v. National L. Ins. Co.*, 176 Iowa 362, 378, 157 N.W. 929, 934, we quote the following from 3 Pomeroy, Equity Jurisdiction (3d Ed.) section 1090:

> "* * * [HN4] The doctrines are fundamental and familiar that the corporation itself is a legal personality, and holds the full title, legal and equitable, to all corporate property. Stockholders, individually and separately, hold the full title, legal and equitable, to their respective shares of stock. A stockholder does not, by virtue of his stock, acquire any estate, legal or equitable, in the corporate property; he obtains only a right to participate in the lawful dividends while the corporation is in being, and to his proportionate share of the net assets upon its dissolution and final settlement. * * *."

In *Liken v. Shaffer*, 64 F. Supp. 432, 438 (N.D. **[**6]** Iowa 1947) Judge Graven wrote:

> "* * * [HN5] It is well settled that the property of a corporation is not the property of the individual stockholders. *Stewart v. Pierce*, 1902, 116 Iowa 733, 89 N.W. 234. On page 240 of the Northwestern citation in that case, the Iowa Supreme Court states: 'The property of a corporation is also entirely distinct from the property in the shares of stock issued by it, and the stockholders are not the owners of its property as individuals.' In the case of *Klein v. Board of Tax Supervisors*, 1930, 282 U.S. 19, on page 24, 51 S. Ct. 15, on page 16, 75 L. Ed. 140, 73 A.L.R. 679, Justice Holmes succinctly states: 'But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with the intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.'"

The general rule is also stated in 18 C.J.S., Corporations, § 512 and 18 Am.Jur.2d, Corporations, section 486.

The corporation's distribution of milk to its members was a transfer of title to property for a fixed price. A contrary holding **[**7]** could be reached only by "piercing the corporate veil." The record discloses no compelling reason for doing so.

II. Defendant-appellant's second argument is that Code section 192.11 was not intended to prohibit the distribution of milk involved in this case. It points out it is a *bona fide* corporation whose members are genuinely interested in obtaining unpasteurized milk because they believe it is healthier and more wholesome than pasteurized milk. Defendant then argues section 192.11 was designed to prohibit sales to the general public and that the corporation distributes milk to its members, not the public. Like the trial court, we do not agree.

Assuming arguendo statutory construction of section 192.11 is necessary the following from *Iowa Nat. Indus. Loan Co. v. Iowa State, Etc*., Iowa, 224 N.W.2d 437, 439, 440, is relevant here:

> [HN6] "In the countless cases this court has considered over the years, many rules of statutory construction have evolved. **[*87]** With one exception none of them is to be used to the exclusion of the others and all must be applied together in the light of the particular facts of the case then under examination. The single departure from this **[**8]** relates to the polestar of all statutory construction - the search for the true intention of the legislature. The other interpretative guides are all designed, in one way or another, to help us reach that goal. Among the cases emphasizing this primary rule are [Citations].
>
> "Our previous holdings also establish the following general guidelines:
>
> "(1) In considering legislative enactments we should avoid strained, impractical or absurd results. [Citations].
>
> "(2) Ordinarily, the usual and ordinary meaning is to be given the language used but the manifest intent of the legislature will prevail over the literal import of the words used. [Citations].
>
> "(3) Where language is clear and plain, there is no room for construction. [Citations].
>
> "(4) We should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. [Citations].
>
> "(5) All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion. [Citations].
>
> "(6) * * *.
>
> "(7) * * *."

Additionally it must be **[**9]** noted that [HN7] a law providing regulations conducive to the public good and welfare, is ordinarily remedial, and as such liberally interpreted. *State Ex. Rel. Turner v. Koscot Interplanetary, Inc*., Iowa, 191 N.W.2d 624, 629, and citations. See also 3, Sutherland, Statutory Construction (4th Ed.) section 71.01; 73 Am.Jur.2d, Statutes, section 281 and 82 C.J.S., Statutes, § 388.

[HN8] Section 192.11 is a statute enacted to protect public health, and as such must be construed liberally to effect its purpose. The statute prohibits sales of unpasteurized milk to the "final consumer." The members of the corporation were final consumers within the meaning of section 192.11. The trial court properly issued the injunction to prevent further sales of unpasteurized milk to them.

AFFIRMED.

TAB 24

FILED
2012 JAN 26 PM 2:44
CLERK OF DISTRICT COURT
LINN COUNTY, IOWA

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

MINDY SLIPPY, Plaintiff vs. BILL NORTHEY, Secretary of Iowa Department of Agriculture and Land Stewardship Defendant.	)))))))))))	No. EQCV067968 **RULING**

On this 26 day of January, 2012, Defendant's Motion for Summary Judgment, Resistance thereto and Motion to Strike filed by Petitioner, Defendant's Resistance to Plaintiff's Motion to Strike, and Defendant's Reply to Plaintiff's Resistance to Summary Judgment came before the undersigned. Upon review of the file, the Court finds a hearing on the Motions is unnecessary. Having considered the file, relevant case law, and written arguments of counsel, the Court hereby enters the following ruling:

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff (hereinafter Slippy), with former Plaintiff Freitag, filed a Petition for Declaratory Judgment and Other Injunctive Relief on January 25, 2010. Plaintiffs sought four specific declarations: 1) they are entitled to own personal property in the form of a cow; 2) they are entitled to consume unpasteurized milk (raw milk) and other unpasteurized dairy products from their personal cow; 3) they are entitled to enter into a boarding agreement with a farmer for that farmer to tend to, manage, and care for their personal cow on their behalf; and 4) they are entitled to enter into a service contract with the farmer to convert some of the unpasteurized milk produced by their cow into other unpasteurized dairy products such as butter, yogurt, or kefir. Freitag dismissed his claim on March 10, 2011.

In addition, Slippy sought a permanent injunction to enjoin the Iowa Department of Agriculture and Land Stewardship (hereinafter IDALS) from interpreting Iowa Code §192.103 as prohibiting her from owning a cow, boarding a cow, and consuming raw milk and raw milk products from her personal cow, alleging they would suffer permanent, irreparable and actual harm if IDALS were to interpret and apply the statute in this manner. In the Petition, Slippy stated she entered into a private contract, or Bill of Sale, with an Amish farmer[1] for the purchase of a cow(s). Slippy and former Plaintiff Freitag had separate but identical contracts with the same farmer to board, care for, manage, and tend to their cow(s). In addition to the fee Slippy paid in the Bill of Sale,

[1] The farmer and Herd Manager referred to in this action has been identified by Defendant as Jesse Yoder. Mr. Yoder is not a party to this action.

under the Herd Boarding Agreement she paid the farmer a monthly fee. Slippy refers to this arrangement in her pleadings as an "Agistment Agreement "

Slippy and the farmer executed their first agreements on August 26, 2008. One agreement is titled "Initial Bill of Sale, Undivided Interest in a Dairy Herd." The other is a "Herd Boarding Agreement." Under the Bill of Sale (BOS), Slippy acquired seven shares in a herd of dairy cattle consisting of at least forty (40) dairy cows for $210, equaling $30 per share. The BOS expressly prohibits Slippy from selling her shares to anyone other than the Seller (Yoder), who would purchase the shares at the current market value. The agreement also states:

> "Buyer's interest in the herd also includes a share of the milk production from the herd. The amount of milk production attributable to Buyer's percentage interest in the herd shall be an amount that is equivalent to the Buyer's percentage interest in the herd.....Buyer's duties for receiving his/her quota of milk production from the herd shall be in accordance with a Herd Boarding Agreement that is being executed by the Buyer and Seller simultaneously with this initial Bill of Sale."

The BOS states the Buyer insisted the milk derived from her share be unpasteurized. The BOS required the Buyer to place her initials indicating she had read provisions regarding the possible presence of harmful bacteria in unpasteurized milk, as well as an acknowledgment that the unpasteurized milk she acquired were solely for her own use and was not to be used for re-sale. The BOS explicitly states Slippy is not entitled to any profits from the management of the herd, nor is she responsible for any losses incurred. Slippy testified in her deposition that her seven shares entitled her only to a corresponding seven gallons of raw milk.

The Herd Boarding Agreement (HBA), executed the same day, classified Slippy as "joint and several owner ("Herdshare Owner") of an undivided interest in a herd" of dairy cows located at the farmer's dairy. The HBA requires Slippy pay $175 per month ($25 per share) for boarding her share of the herd. Like the BOS, the HBA prohibits Slippy from disposing of her shares by any manner other than selling them back to the Herd Manager, who was to purchase them at the price he was currently selling the shares.

Other than the monthly fee, Slippy's only duties were to pick up her share of milk at a time agreed upon by the parties, to provide all jugs, bottles, and caps for bottling the milk, and to transport the milk to her home herself. The Herd Manager was responsible for bottling and cooling the milk, maintaining and caring for the herd, and paying all expenses incurred for the care of the herd other than "extraordinary" veterinary expenses, which would be assessed to each shareholder on a pro rata basis. Section 5 of the HBA states the parties may not transfer any ownership or possession of the milk production from the "Herdshare Owners'" interest in a transaction which would violate the laws of the State of Iowa.

According to the HBA, if any Boarding Agreement in place within the herd is terminated, the remaining "Boarders" must find a replacement(s) Boarder for that share of the herd. If they are unable to find a replacement, the HBA is terminated and the Boarders must sell their shares in the herd back to the Herd Manager. In the event either Slippy or Yoder wished to terminate the HBA, Yoder was required to buy back her shares and return all outstanding boarding fees pro rata. Yoder retained a possessory lien in Slippy's shares, which he could sell if she failed to pay her boarding fee for two consecutive months. Any profit realized by a sale under these circumstances was to be retained by Yoder.

Section 11(A) of the HBA states the parties do not intend the agreement to be construed as a sale of raw milk. Section 11(B) states:

> "No Consumer Transaction – The parties agree and state it is their intention that the acquisition of milk by the Boarder is not a consumer transaction subject to regulation under applicable Iowa law."

Slippy regularly paid her fees and visited the farm to pick up milk produced by her herd share in accordance with the BOS and HBA. She took the raw, unpasteurized milk home where it was consumed only by Slippy and her family members. Slippy and Yoder also agreed he was to use some of her share of the raw milk to make raw dairy products such as yogurt, butter, and kefir for her personal consumption.

On February 2, 2009, IDALS sent a cease and desist letter to Yoder. The letter notified Yoder that IDALS had received information that he was involved in several herd share arrangements in violation of Iowa Code §192.103, which expressly prohibits the sale of raw, unpasteurized milk. The letter advised Yoder that if he continued to sell raw milk, his State milking permit would be terminated. Neither Slippy nor any of the other herdshare owners were identified or mentioned in IDALS' letter. Slippy did not receive a copy of the letter and it is undisputed that IDALS has never initiated an enforcement action against her or sent her any similar correspondence. Slippy's legal claims are all linked to IDALS' letter to Yoder, and IDALS' interpretation of her herd share arrangement as a sale. Slippy claims that as a result of the IDALS letter, Yoder stopped tending to, caring for, and managing her cow(s) on her behalf. Slippy stopped visiting the farm to pick up raw milk and raw milk products produced by her "shares" and discontinued her monthly payments. The agreements were never explicitly terminated and Yoder did not buy back Slippy's shares or sell them to another Boarder as directed in the HBA.

After filing this action on January 25, 2010, Slippy executed another BOS and HBA with Yoder on February 18, 2010. Both agreements were similar to the first, however, this time Slippy purchased eight shares for $75 per share for a total of $600. Yoder deducted her previous payment of $210 under the first BOS from this total, thus, Slippy paid $390. In addition, the 2010 BOS granted Slippy eight (8) shares in a herd of four (4) cows set aside for the herd share. Again, Slippy could not dispose of her shares other than by selling them back to Yoder. The BOS provided that Slippy's interest in the

herd includes a share of milk production from the herd equivalent to her interest of eight (8) shares in the herd.

Slippy also executed a second HBA outlining the parties' responsibilities regarding the care and management of the herd. The 2010 HBA is also similar to the 2008 agreement, however, the monthly boarding fee dropped to $19.50 per share. Slippy testified in her deposition that Yoder lowered the HBA fee because he was concerned that the former fee would pose a financial burden given the increased sale price in the new BOS. Termination of the agreement results in Slippy selling her shares back to Yoder. Unlike the first HBA, the second states Slippy is responsible for bottling her own milk and the farmer is responsible for providing the bottles and caps. Slippy testified in her deposition, and it is undisputed, that despite this provision in the new HBA Yoder continued bottling and cooling her milk as he did under the first HBA. The milk produced by Slippy's herd share is commingled with the milk of the other share owners in a large vat, cooled, and bottled in plastic gallon-size jugs. There are no markings or labels on the jugs indicating they are set aside for any particular herd share owner.

Sections 5 and 11(A) of the 2010 HBA again state the agreement is not a sale of raw milk. However, Section 5 contains a caveat that the section only applies "if it is illegal to sell raw milk in your state" and contains blanks where the parties may enter the name of the state if it is, in fact, illegal to sell raw milk in their state. In the 2010 HBA in question, "Iowa" has been written in the blanks on Slippy's HBA.

Slippy claimed IDALS' actions and enforcement of Iowa Code § 192.03 against Yoder injured her and deprived her of the fundamental right to own and use her personal property, her inalienable right to consume the food of her choice, and her right to enjoy the benefits of her private contract. In addition, Slippy claimed IDALS' threat of enforcement action against Yoder guarantees her standing to challenge the regulation because a declaratory ruling in her favor would redress her injury and allow her to use her personal property to provide for the care and well being of her family by consuming the food of her choice. Slippy denied that she purchased raw milk or raw milk products from Yoder.

In her Petition, Slippy raised several arguments on Constitutional grounds and claimed the IDALS's action was not subject to Iowa's Administrative Procedure Act. She stated IDALS did not have the authority to address the constitutional issues she had raised and judicial review was her only remedy.

Slippy claimed IDALS actions violated her rights under the Iowa Constitution to possess, use, and enjoy one's property, the right to privacy; and right to contract. She sought the following relief:

1) A declaration that Slippy and her family have the inalienable right to purchase, own, possess and use a cow;
2) A declaration that Slippy and her family have the inalienable right to consume the raw milk and dairy products produced by their cow;

3) A declaration that Slippy and her family have the inalienable right to enter into a boarding contract or Agistment Agreement with an Iowa farmer to tend to, manage, and take care of her cow;
4) A declaration that Slippy and her family have the inalienable right to enter into a services contract with a third party for the conversion of some raw milk produced by her cow into other raw milk dairy products;
5) A declaration that IDALS February 2, 2009, letter to Yoder is unconstitutional as applied to Slippy;
6) A declaration that Iowa Code §192.103 is unconstitutional as applied to Slippy;
7) A permanent injunction enjoining IDALS from commencing or continuing any enforcement action, civil, criminal, administrative or otherwise of Iowa Code §192.103 against Slippy or anyone else who wishes to engage in conduct engaged in by Slippy;
8) Attorney's fees and costs.

In its Answer, IDALS denied all allegations adverse to them and set forth the affirmative defenses that Slippy lacks standing to challenge their actions and she has failed to join all indispensible parties for the adjudication of her claims. IDALS admitted sending the February 2, 2009 letter to Yoder, but denied their actions infringed upon any of Slippy's rights or injured her. IDALS denied Plaintiff's agreements with Yoder were contracts for the purchase of a cow or to care for her cow. Rather, IDALS asserts Slippy's contracts are an attempt to circumvent the law and are essentially sham agreements to lease a cow for the sole purpose of purchasing raw milk, the sale of which is prohibited by Iowa Code § 192.103. IDALS asserts the arrangement essentially allows Slippy to pre-pay the farmer for her milk, thus avoiding payment at the time of pick-up and the appearance of a sale.

Defendant filed their Motion for Summary Judgment on September 8, 2011. IDALS argues they are entitled to judgment as a matter of law because Slippy lacks standing to maintain her claim. IDALS argues their enforcement action was not directed at her, but at the farmer from whom she obtained raw milk, and they have not taken further action against Yoder. Since she has never been under threat of prosecution, cannot be prosecuted for purchasing or consuming raw milk, and has not established a concrete and particularized injury, IDALS asserts Slippy has not demonstrated she has standing to challenge their action under Iowa Code § 192.103.

Defendant's second argument involves Slippy's BOS and HBA agreements. IDALS asserts Slippy's constitutional arguments need only be considered if the Court finds Slippy has standing and that her transactions with the farmer constitute a sale of raw milk. If the transaction is not a sale, IDALS concedes it does not have authority to regulate Slippy's agreements with Yoder. However, IDALS argues the undisputed facts establish the true substance of the transaction is an illegal sale of raw milk.

Defendant's third argument is that IDALS is entitled to summary judgment on Slippy's claim that their action violates her property rights because their actions are not

arbitrary and unreasonable, nor have they violated Slippy's right to own a cow and use that cow for her own enjoyment and benefit. IDALS argues Slippy has mischaracterized her contractual arrangement as one of property ownership of a cow or cows, when it is actually an agreement for the sale of raw milk.

Fourth, IDALS claims they are entitled to summary judgment on Slippy's Due Process claims because she has not carefully described the fundamental right she is seeking to protect. Further, IDALS claims they have a rational basis for prohibiting the sale of raw milk, and treating a herd share arrangement such as Slippy's as a sale does not qualify as a government activity that violates her substantive due process rights.

Fifth, IDALS claims they are entitled to summary judgment as a matter of law on Slippy's claim their action violated her constitutional right to privacy. IDALS does not dispute that Iowans have a right to consume raw milk or whichever food they please, but argues Slippy has not shown that the right to privacy entitles her to the right to enter into a contractual arrangement to purchase raw milk. Further, Defendant claims they have sought only to prevent the farmer from selling raw milk, and have not infringed upon Slippy's right to consume raw milk.

Finally, IDALS seeks judgment as a matter of law on Slippy's claims their action violates her inalienable right to contract under Iowa's Inalienable Rights Clause. IDALS argues the constitutional constraints of government interference with private contracts applies to legislative action, not administrative action. In addition, IDALS argues Slippy's claim cannot succeed because the statute she is challenging was enacted well before she entered into her arrangement with Yoder. Lastly, IDALS argues Slippy's claim cannot succeed because it is a scheme designed solely to skirt Iowa Code § 192.103 in contravention of public policy and regulation of such contracts falls within a legal exception to the right to contract.

Slippy filed her Resistance on October 24, 2011. In conjunction with her Resistance, Slippy filed a Motion to Strike Defendant's Appendix pages 2-3 as unauthenticated documents pursuant to Iowa R. Civ. P. 1.434. Defendant attached the documents as "Iowa Department of Public Health Memoranda on Raw Milk Consumption." One document is dated January 28, 2011, and the other is dated January 15, 2010. Both are on Iowa Department of Public Health letterhead but are not signed or accompanied with an affidavit attesting to their authenticity. Slippy argues the documents cannot be admitted unless they are authenticated, and Defendant did not establish authenticity by attaching an affidavit from a competent person who can attest that the documents are what they purport to be.

Defendant Resists Plaintiff's Motion to Strike by arguing under Iowa R. Civ. P 5.902, evidence of authenticity is not required for official publications "purporting to be issued by public authority." Defendant argues the documents were issued by the Iowa Department of Public Health, which is clearly a public authority and the Memoranda falls within the exceptions noted in Iowa R. Civ. P. 5.902(5) Therefore, Defendant claims the documents are self-authenticated and admissible.

As for her Resistance to Defendant's Motion for Summary Judgment, Slippy claims there are several outstanding issues of material fact that render summary judgment inappropriate. Specifically, Slippy disputes IDALS characterization of her agreements with Yoder as a contractual scheme meant to circumvent Iowa Code § 192.103. Rather, Slippy claims the first agreement was a legal purchase of an undivided interest in "a cow" and the second agreement was a legal purchase of an undivided interest in "a herd of dairy cows." She argues she has standing to maintain her action because she is faced with a "Hobson's Choice" of continuing to engage in conduct the State considers illegal or stop the activity even though she believes the State's interpretation of the law is illegal. Slippy claims her conduct is not an attempt to circumvent the law, rather, the State's enforcement of Iowa Code § 192.103 against her is an attempt to circumvent her constitutional rights.

Slippy argues either she has standing to challenge the State's actions or the State has no jurisdiction over her conduct. She argues that since her action is for declaratory judgment, she does not have to show injury in fact or causation. Slippy claims she has standing because she has a personal stake in the outcome of the case. In doing so, Slippy claims she has sustained sufficient injury because she is the target or object of IDALS action. Slippy argues since the State is attempting to enforce their regulations against the sale of raw milk, as the alleged buyer in the transaction, the State is also essentially accusing her of engaging in illegal activity by owning and boarding a cow and drinking the milk from her cow.

Additionally, Slippy disputes that her number of shares is equal to the number of gallons of milk she is entitled to under the agreements. She claims her shares entitle her to a percentage of milk produced by her herd share rather than a certain number of gallons. In support of this argument, Slippy provides an affidavit claiming her deposition testimony, in which she consistently equates her shares with gallons, is inaccurate. Among other issues, Slippy makes several statements in her affidavit regarding the benefits of drinking raw milk and the detriments of pasteurized milk and commercial dairy practices supported by the government. Slippy states her deposition testimony was inaccurate because she was nervous and did not understand the questions.

Although in her deposition she stated she never picked up more than seven (7) gallons per week under the first agreement and eight (8) gallons under the second, in her affidavit she states there were times when she picked up more or less milk when the cows in her herd share were freshening or drying up. In her first deposition, Slippy surmised a cow likely produced twenty (20) gallons of milk per week. She further explained that her seven (7) shares entitled her to seven (7) gallons of milk per week under the first agreement, and under the second agreement her eight (8) shares entitled her to eight (8) gallons per week. In her affidavit, Slippy states her seven (7) ownership shares entitled her to 35% of milk produced by the herd under the first agreement and her eight (8) ownership shares entitled her 40% of milk produced under the second agreement. Thus, Slippy claims, at times she picked up more or less than seven (7) or eight (8) gallons depending on the fluctuation of production of the herd due to the drying

up or freshening status of the herd. Slippy concedes that on the majority of occasions, she picked up seven (7) or eight (8) gallons of milk per week. Both BOS and HBA agreements give the farmer the right to dispose of any extra milk produced by Slippy's share in any way he sees fit.

In her Resistance, Plaintiff cites several instances in history of the government oppressing it's citizens or otherwise infringing upon their rights such as previous government regulations as those prohibiting interracial marriage, regulations mandating segregated schools, laws prohibiting parents from home schooling their children, and prohibitions on women's right to vote. Plaintiff argues the State of Iowa (via IDALS) enactment and enforcement of Iowa Code § 192.103 is essentially a statement that its citizens do not have the right to own a cow, enter into a contract to board their cow and have that farmer tend to their cow, or the right to drink the milk produced by that cow. Slippy argues IDALS' infringement upon those rights in the name of public health and welfare are "paternalistic and treat Iowa's citizens as wards of the State." Slippy further claims the State's public health basis for Iowa Code § 192.103 is invalid because consuming raw milk is less of a health hazard than consuming pasteurized milk. Finally, Slippy claims Iowa Code § 192.103 does not apply to her because her conduct is private and does not impact public health. Finally, Slippy requests that if the court finds the BOS and HBA are invalid that the court reform her agreements with Yoder to comply with the law as she intended.

Attached to Slippy's Resistance as an authority is an affidavit given by Peter Kennedy, an attorney licensed in Florida and President of the Farm-to-Consumer Legal Defense Fund. Mr. Kennedy has provided legal representation to members of the organization since its inception in 2007. Mr. Kennedy argues the requirement that milk for sale must first be pasteurized does not have a basis in our Nation's heritage, however, consumption of raw milk is part of our Nation's heritage and should be protected. He cites several statistical studies on food safety and concludes the dangers of consuming raw milk are very small and are not a threat to public health that is worthy of government regulation. He opines raw milk is actually safer than pasteurized milk. Mr. Kennedy also asserts he has reviewed Slippy's BOS and HOA and has come to the conclusion they are in compliance with Iowa law.

IDALS filed their Reply to Plaintiff's Resistance on November 7, 2011. IDALS reasserts their argument that Slippy lacks standing and states her claim is based on a mischaracterization of what conduct is prohibited by Iowa Code § 192.103. IDALS notes Slippy is not and cannot be subject to prosecution under Iowa Code § 192.103 for purchasing and consuming raw milk. Therefore, she is not faced with a "Hobson's Choice" and lacks standing. IDALS further argues Mr. Kennedy, as a lawyer for an advocacy group without a scientific background, is not a qualified or credible witness to speak to the innocuous nature of raw milk or the alleged danger to public health of pasteurized milk.

IDALS also states Slippy has failed to demonstrate there are genuine issues of material fact and all remaining disputes are matters of law. IDALS asserts Slippy has

improperly attempted to manufacture issues of material fact by disputing her own deposition testimony, but nonetheless the facts she attempts to place in dispute are not material to the outcome of the case.

IDALS argues the constitutional arguments raised by Slippy are red herrings because they either mis-state the fundamental rights she is seeking to protect or they fail to address IDALS' claims for summary judgment. As pertains to Slippy's claimed right to contract, IDALS argues Slippy waived her resistance to summary judgment on Defendant's claims under the Contract Clause by failing to address them in her resistance. IDALS also notes that Slippy has not met the burden required for reformation of contracts.

II. CONCLUSIONS OF LAW

A. Plaintiff's Motion to Strike Defendant's Appendix pages 2-3

I.C.A. Rule 5.902 lists the exceptions to the rule requiring evidence of authenticity before documents can be admitted. If a document falls within an exception, it is considered self-authenticating. I.C.A. Rule 5.902(5) grants self-authenticating status to official publications, which include "books, pamphlets, or other publications purporting to be issued by public authority." Iowa Rule of Evidence 5.803(8) grants a hearsay exception to public records and reports. Rule 5.803(8) states in part:

> "....records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to a duty imposed by law..."

Such documents are self-authenticating and do not require certification or testimony from a witness or custodian to lay a foundation. *State v. Redmond*, 2011 WL 3115845 *2.

The publications Plaintiff seeks to exclude are memoranda issued by the Iowa Department of Public Health (IDPH), which is a public authority charged with "promoting and protecting the health of Iowans." http://www.idph.state.ia.us. The Division of Environmental Health of the IDPH administers the IDPH "Grade 'A' Milk Certification Program." http://www/idph.state.ia.us/WhatWeDo/Profiles.aspx. Both memoranda purport to describe the harmful bacteria that may be present in unpasteurized milk and are submitted in support of Defendant's argument the prohibition on the sale of raw milk is based on the agency's goal protecting public health. Iowa Code § 189 outlines general provisions and definitions regarding agriculture-related products and activities. Iowa Code § 189.1(5) defines pasteurization as "the procedure of processing milk or a milk product, in order to ensure its safety from contaminants."

Although the publications do not bear a signature, they are on Iowa Department of Public Health letterhead, accurately state the relevant elected and appointed officials in place at the time each memoranda was issued, and purport to convey information

regarding unpasteurized milk that is consistent with the Iowa Department of Public Health's stated mission and promotion of Grade "A" pasteurized milk. It also speaks to recent outbreaks of illness in Iowa attributed to consumption of raw milk. The information in the Memoranda is consistent with the duties of IDPH and the definitions and goals set forth in Iowa Code.

The Court finds the documents contained in Defendant's Appendix in Support of Motion for Summary Judgment, pages 2 and 3, are self-authenticating official publications issued by a public authority. Therefore, the memoranda are admissible and Plaintiff's Motion to Strike is **DENIED**.

B. Defendant's Motion for Summary Judgment

1. Summary Judgment Standard

"Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to summary judgment as a matter of law." *Kolarik v. Cory Intern. Corp.*, 721 N.W. 2d 159, 162 (Iowa 2006) (citing Iowa R. Civ. P. 1.981(3)). A fact is considered material only if it affects the outcome of the suit. *Estate of Harris v. Papa John's Pizza,* 679 N.W. 2d 673, 677 (Iowa 2004)(citing *Phillips v. Covenant Clinic*, 625 N.W. 2d 714-718 (Iowa 2001)). The moving party bears the burden of showing the material facts are undisputed, and non-moving party must be given the benefit of any legitimate legal inference in evidence. *Faeth v. State Farm Mut. Auto Ins. Co.*, 707 N.W. 2d 328, 331 (Iowa 2005).

"When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party." *Eggiman v. Self-Insured Services Co.*, 718 N.W. 2d 754, 763 (Iowa 2006)(citing *Daboll v. Hoden*, 222 N.W. 2d 727, 733 (Iowa 1974). ("When reasonable minds could draw different inferences and conclusions, even if the facts are undisputed, the matter must be reserved for trial."). The court must consider every reasonable, legitimate inference that could be reasonably deduced on behalf of the nonmoving party. *Phillips* at 717. However, an inference is not legitimate if it is "based on speculation or conjecture." *Id.*,citing *Butler v. Hoover Nature Trail, Inc.*, 530 N.W. 2d 85, 88 (Iowa Ct. App. 1994). Speculation does not create a genuine issue of material fact. *Hlubeck v. Pelecky*, 701 N.W. 2d 93, 96 (Iowa 2005).

"To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law." *McVey v. National Organization Service, Inc.*, 719 N.W. 2d 801, 802 (Iowa 2006) (citing *Goodwin v. City of Bloomfield,* 203 N.W. 2d 582, 588 (Iowa 1973)). "To affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case, the moving party may rely on admissions in the pleadings....affidavits, depositions, answers to interrogatories by the nonmoving party, and admissions on file." *Id.* For their part, the resisting party "may not

rest upon the mere allegations of his pleading but must set forth specific facts showing the existence of a genuine issue for trial." *Hlubeck* at 95.

2. Is Defendant entitled to summary judgment because Plaintiff lacks standing to maintain her cause of action?

A complainant must have standing to support a claim that her constitutional rights have been violated. *Godfrey v. State*, 752 N.W. 2d 413 (Iowa 2008). The Iowa doctrine of standing parallels that of federal law. *Alons v. Iowa District Court for Woodbury County,* 698 N.W. 2d 858, 869 (Iowa 2005). For an action to stand, the plaintiff must demonstrate a specific personal or legal interest in the litigation and that she is injured by the action. *Banks v. Iowa Department of Public Safety*, 791 N.W. 2d 431, 432-33 (IA Ct. App. 2010) When standing is at issue, the focus is on the party bringing the action. *Alons* at 863-864 (citations omitted). "The question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded." *Id.* at 864, citing 59 Am. Jur. 2d Parties § 36 at 442 (2002).

Although Plaintiff argues otherwise, under Iowa law, the standards for establishing standing for declaratory judgments are no different than for any other action. *Banks* at 432. "Our cases have determined the complaining party must (1) have a specific personal or legal interest in the litigation, and (2) be injuriously affected." *Citizens for Responsible Choices v. City of Shenendoah*, 686 N.W. 2d 470, 475 (Iowa 2004). These are two separate requirements and both must be satisfied for the action to stand. *Hawkeye Bancorporation v. Iowa College Aid Comm'n*, 360 N.W. 2d 798, 801 (Iowa 1985). In other words, Slippy must demonstrate that IDALS' actions not only "produce a legally cognizable injury" but also that she is the one who sustained that injury. *Citizens* at 475, citing *Iowa Civil Liberties Union v. Critelli*, 244 N.W. 2d 564, 567 (Iowa 1976).

To be a legally cognizable injury, there must be (1) an injury-in-fact to a legally protected interest that is "concrete and particularized" and "actual or imminent", not 'conjectural 'or 'hypothetical'; (2) a causal connection between the injury and offensive conduct that is "fairly traceable" to the challenged action of the defendant; and (3) the injury must be "likely" as opposed to merely "speculative". *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations omitted). In addition, the injury must be such that it can be redressed by a favorable decision. *Id.*

Speculation that an injury may occur does not establish the concrete and particularized injury required to show standing. *Citizens* at 475. In *Citizens*, the plaintiffs were landowners whose property was under consideration for possible government taking for development of a recreational area by the City of Shenendoah. Even though the plaintiffs were landowners who would potentially be subject to a government taking of real property, thereby directly affected by the City's actions, the Court found they did not have standing to challenge the action because the City was not close to finalizing the

funding and plans for the project, therefore, the property owners could not demonstrate a concrete, actual injury that was likely rather than speculative. Unlike the landowners in *Citizens,* Slippy's connection to IDALS is not nearly as direct as the property owners' interests were in *Citizens*.

Plaintiff's argument that she has standing is based on her patent mischaracterization of the conduct regulated under Iowa Code § 192.103. The State has accurately asserted that Slippy's participation as a buyer or consumer of raw milk is not within the purview of IDALS' regulation. It is undisputed that Slippy has never sold raw milk. She is not subject to criminal or civil penalties under Iowa Code § 192.103, therefore, the "Hobson's Choice" she claims does not exist. Despite Slippy's attempts to establish herself as "a party who is a target or object of" IDALS' action, the undisputed facts in the record indicate otherwise. *Massachusetts v. E.P.A.,* 549 U.S. 497, 517 (2007). Slippy even claims outright in her Petition that IDALS action was directed at her, but was directed at Yoder. Plaintiff's Petition, pg. 10, lines 55-56. The threat of administrative action against Jesse Yoder, who is not a party to this action, has not created a "concrete and particularized" or "actual and imminent" injury for Slippy.

Slippy does not dispute that she has had continued access to the raw milk from her herd share other than the time period between Yoder's receipt of IDALS' letter and their execution of new agreements shortly after she filed this action. The fact that Yoder discontinued caring for Slippy's herd share (which she mis-names as a single cow in her argument), and that she stopped paying her fee under the 2008 HBA, thus eliminating her access to her preferred source of raw milk for some time, were not the result of IDALS' actions. In reality, Yoder didn't literally stop caring for the herd, allowing the cow Slippy claims to own to perish due to a lack of care, but stopped providing Slippy with her raw milk. This was the result of decisions made by Slippy and Yoder. The only person in this case subject to IDALS' enforcement action is Jesse Yoder. Yoder did not sell Slippy's shares to anyone else, and even deducted her previous purchase price from the purchase price under the second BOS. Thus, Slippy cannot even claim financial injury. Furthermore, Plaintiff does not dispute that IDALS has taken no further enforcement action against Yoder since their February 2009 warning letter. Plaintiff has failed to join him as a party to this action and has not provided any convincing legal authority that she can bootstrap herself to him and include herself as the target of IDALS' action.

Likewise, Plaintiff's argument that if she does not have standing, her agreements with Yoder are not a sale of raw milk and IDALS does not have jurisdiction over her conduct is without merit. IDALS doesn't dispute that they have no jurisdiction over her conduct unless the court finds she does have standing *and* her transactions with Yoder are a "sale" under Iowa law. IDALS is not seeking to regulate Slippy's conduct of buying or consuming raw milk. No matter how many times or how vehemently Slippy attempts to confuse the issue and assert that her alleged right to purchase and consume raw milk are the activities IDALS seeks to regulate, this does not make it so. Furthermore, they are based on plain misstatements of IDALS' arguments. IDALS' arguments on pages 6-14 of their Memorandum of Authorities are explicitly noted on page 3 as arguments

intended for the Court's consideration only upon a finding that Slippy does have standing.

Slippy does not dispute IDALS' statements "Slippy has never received any communication from Defendant concerning raw milk, let alone any communication threatening her with prosecution for buying or consuming raw milk." *Defendant's Statement of Undisputed Facts* ¶ 5. There is no evidence in the record that IDALS has taken further action against Yoder that would potentially interfere with Slippy's preferred source of raw milk in the future. Iowa Code § 192.103 speaks for itself in that it applies only to the sale of raw milk. Even if IDALS defines Slippy's agreements with Yoder as a sale, Slippy is the purchaser, not the seller. The undisputed facts show IDALS has not overstepped their bounds as applied to Slippy because she has not sold raw milk and is not the subject of any IDALS investigation or enforcement action.

Having considered the record in a light most favorable to Plaintiff, the Court concludes the undisputed facts and every reasonable inference under the law show Slippy has failed to establish she has suffered a concrete and particularized injury-in-fact, caused by IDALS, that could be corrected by a favorable decision by this Court. Slippy's claims to injury due to IDALS actions against Yoder are speculative at best. As noted early in this Ruling, speculation does not create an issue of material fact. *Hlubeck* at 96. Therefore, Slippy lacks standing to maintain her cause of action and IDALS' Motion for Summary Judgment is **GRANTED**.

However, should an appellate court find Slippy has standing to maintain her cause of action, the Court now enters the following findings of fact and conclusions of law as to IDALS remaining claims for summary judgment.

3. Is Defendant entitled to summary judgment as a matter of law on its claim that Plaintiff's contractual arrangement with Yoder constitutes a sale of raw milk and is therefore prohibited under Iowa Code § 192.103?

As previously noted, Iowa Code § 192.103 states that only "grade 'A' pasteurized milk and milk products shall be sold to the final consumer." The parties do not dispute that Slippy is the final consumer in this instance, thus the legal interpretation of the term "sale" in the statute as well as its application to Slippy's contractual arrangement with Yoder are the issues to be decided. Unless this Court decides Slippy's contracts with Yoder constitute a sale of raw milk, IDALS admits it does not have jurisdiction to regulate Slippy's (or Yoder's) conduct and the Court should not address Slippy's constitutional claims. *In the Interest of J.A.N.*, 346 N.W. 2d 495, 498 (Iowa 1984) (citing *State v. Davis*, 269 N.W. 2d 434, 439 (Iowa 1978)) (recognizing the court has a duty to avoid constitutional questions when the case can be decided without facing them).

Iowa Code § 190.2, the "Iowa Grade 'A' Milk Inspection Law," empowers IDALS to establish and publish standards for milk and dairy products when such standards are not already fixed by law. Iowa Code § 192.107 outlines the definitions and purposes

behind milk producer permits. It states that producers must be compliant with the requirements of the chapter. When producers are not compliant with the provisions of the chapter, "the department shall suspend a permit whenever there is reason to believe that a public health hazard exists." Although Slippy disputes that raw milk is a public health hazard, the parties do not dispute that Iowa's regulation of the sale of raw milk is based on an agency determination that unpasteurized milk is a threat to public health, safety, and welfare. "A law providing regulations conducive to the public good and welfare, is ordinarily remedial, and as such liberally interpreted." *Johnson County v. Guernsey Association of Johnson County, Inc.*, 232 N.W. 2d 84, 87 (Iowa 1975).

Iowa Code § 192.103 does not define the term "sale." In cases where terms are left undefined by a statute, the agency's interpretation of the term must conform to the power and authority vested in the agency enforcing the regulation. *City of Sioux City v. Iowa Dept. of Revenue & Finance,* 666 N.W. 2d 587, 589 (Iowa 2003). "The goal of statutory construction is to determine legislative intent. *Midland Power Co-op v. Swecker,* 787 N.W. 2d 480 (Iowa Ct. App. 2010).

Iowa Code § 159, IDALS' enabling statute, generally describes the duties and powers granted to the Iowa Department of Agriculture and Land Stewardship by the Iowa Legislature. Plaintiff argues IDALS actions are in opposition to the stated "objects" in Iowa Code § 159(5), which include promotion of agricultural interests and implementation of policies the instill confidence in the public in Iowa's agricultural industry. However, there are several sub-sections of IDALS' enabling statute, and in Iowa Code § 159.6(7), IDALS is charged with the duty of enforcing laws related to the "regulation and inspection of foods, drugs, and other articles." This power includes the ability to define and interpret terms related to this duty.

When an administrative agency is charged with administering and enforcing statutory provisions, it makes sense that the agency should also have the authority to define the terms left undefined by the Legislature in order to fulfill its enforcement responsibilities. *City of Sioux City* at 590. In the instant case, IDALS has interpreted Slippy's contractual arrangement with Yoder as a sale for the sole purpose of acquiring raw milk as opposed to the acquisition of private property in the form of a cow. In doing so, IDALS applied the definition of "sale" contained in Iowa Code § 423.1(48) which states:

> "Sales" or "sale" is any transfer, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, for consideration."

The application of Iowa Code § 423.1(48) to define the term "sale" in Iowa Code § 192.103 and other Iowa statutes has the support of the courts. *Johnson County* at 87.

There is really no dispute between the parties that Slippy's transactions with Yoder are "sales" under this definition. The dispute is whether the object of the sale is a cow(s) or shares of a herd, as Slippy asserts, or raw milk produced by cows owned by Yoder.

Iowa law recognizes the concept of undivided ownership in livestock. *Folkers v. Britt,* 457 N.W. 2d 578 (Iowa 1990). Slippy asserts in her pleadings that she has an undivided ownership interest in her cow/herd and the right to enter into an agistment agreement and pay a farmer to care for her cow/herd. The parties do not dispute the actual wording or written terms in the BOS and HBA agreements, but the construction and interpretation of those terms. Matters of construction and interpretation are legal issues, not factual issues, and are decided as a matter of law. *Fashion Fabrics v. Retail Investors Corp.*, 266 N.W. 2d 22, 25 (Iowa 1978). In matters of contract construction and interpretation tried in equity, we consider substance and intent over form. *Federal Land Bank of Omaha v. Bollin,* 408 N.W. 2d 56, 62 (Iowa 1987). The court looks to the subsequent conduct of the parties to discover the true intentions of the parties. *Id.*

Although Slippy's deposition testimony and discovery responses vacillate between Slippy owning shares of a herd of forty (40) cows, shares of one cow, one whole cow, and shares of a herd of four (4) cows, in her Petition and Resistance she claims she contracted with Yoder to purchase one single, particular cow and to pay Yoder to care for her cow and provide her with the raw milk produced by this one cow. For their part, IDALS claims the conduct of the parties and the results of the agreements indicate the transaction was the exchange of raw milk for a monthly fee in the form of the HBA, the rights to which were reserved by a down payment in the form of the BOS.

The parties do not dispute that the BOS and HBA do not entitle Slippy to any benefit other than raw milk and raw milk products in a proportionate amount equal to her shares, regardless of the size of the herd. Slippy does not dispute the material facts regarding the substance of the transaction. She cannot dispose of her shares or interest in her cow/herd in any way other than to sell them back to Yoder at the current sale price, which is entirely within his discretion. She is not entitled to any benefit or profit in proportion to her interest in the herd, nor is she obligated for any losses incurred. Her shares in the herd are contingent upon all of the other interests held by other Boarders remaining in effect. Yoder could terminate both agreements at any time without consequence so long as he returns Slippy's fees for that month pro rata.

The disclaimer in the 2010 HBA stating the transaction is not to be considered a sale of raw milk, *but only if it is illegal to sell raw milk in your jurisdiction*, is a strong indication that the parties were aware the transaction was actually a sale of raw milk prohibited by law in Iowa. In addition, Slippy does not dispute IDALS' statement that the price Yoder assigned to Slippy's shares in the BOS undervalued the price of a dairy cow by 150%, yet another indication that the transactions were not an exchange of property ownership in a cow for consideration. We agree with IDALS that Slippy's transactions with Yoder have all the markings of an animal-share leasing arrangement, in which the "renter" pays a fee, purportedly for a share of a dairy cow, and keeps the milk produced by that "animal/share," but has no other benefits under the contract. This is a common practice in states where it is illegal to sell raw milk and is meant solely for the purpose of exploiting loopholes in state raw milk sale prohibitions. See Damien C. Adams, Michael

T. Olexa, Tracey L. Owens & Joshua Crossly, *Deja Moo: Is the Return to Public Sale of Raw Milk Udder Nonsense?,* 13 Drake J. Agric. L. 305, 318-319 (2008).

The Iowa Supreme Court has defined property ownership as the "collection of rights to use and enjoy property, *including the right to transfer it to others*" and "the right of one or more persons to possess and use a thing to the exclusion of others. The right by which a thing belongs to some one (sic) in particular, to the exclusion of all other persons." *State v. TeBockhorst,* 305 N.W. 2d 705, 707 (Iowa 1981) (citing Black's Law Dictionary 997 (5th Ed. 1979), emphasis added. Slippy's property interest under the agreements, although it purports to be a share of a cow, is in reality only a share of raw milk produced by the cows in Yoder's herd. The BOS reserves title and the right to defend and exclude others from ownership of the cow to Jesse Yoder. We agree with IDALS that the arrangement lacks the permanency and landmarks of ownership interest expected in instances of true property ownership.

In *Johnson County*, the court was charged with determining whether a non-profit corporation's practice of distributing raw milk for a fee to corporation members constituted a sale of raw milk prohibited by Iowa Code § 192.A, the predecessor to Iowa Code § 192.103. The corporation argued that since its members were shareholders in the corporation, they each had an individual ownership interest in the cows and the milk produced, and the exchange of milk for a fee was not a sale. Although the facts are slightly different in this case, the *Johnson County* decision provides guidance on the issue. In *Johnson County*, the corporation argued the transactions were not a sale because the cows were owned as shares by the members of the corporation, who were the only individuals with access to the milk. The court found the cows were not the property of the individual shareholders, but of the corporation itself, therefore, an exchange of milk between the corporation and its members for a fee was a sale of raw milk. *Johnson County* at 85-86.

The similarity here is that although Yoder is obviously not a corporation, under the substance of the agreements, he retains complete ownership of the cows, or shares of a cow, or shares of a herd. The provisions of Slippy's BOS and HBA entitle her only to a share of raw milk produced in proportion to pre-paid fee in the form of the HBA. Likewise, the provisions of the lease agreement in *Johnson County* between the corporation and the cow's owners/boarders, entitled the corporation's members only to the milk produced by the corporation's herd share, and each shareholder was assessed a fee for the care of the herd that was based on his or her consumption of raw milk rather than the actual cost to care for the herd. *Johnson County* at 85. The court found the corporation's transfer of title, although it purported to be ownership shares in the herd, was actually ownership interest in the shares of raw milk produced by the herd. Thus, the corporation's distribution of milk to its members for a fixed fee was a sale of milk according to the legal definition of a sale. *Id.* at 86.

Despite the fact that Slippy's HBA's state they are not to be interpreted as a sale of raw milk, the substance of the agreements and the subsequent conduct of the parties demonstrate that those are empty words. The agreements are clear, and Slippy does

not dispute, that her "ownership" interest in the herd entitles her to nothing more than a reserved share of raw milk. She cannot dispose of her shares at her discretion and is at the mercy of Yoder's valuation of the shares when she sells them back. She cannot remove her "cow" or "herd" from Yoder's possession because her ownership interest under the agreements is not a "cow" or "herd." Although Slippy makes much about the validity and historical custom of agistment agreements this is irrelevant because Slippy does not dispute IDALS assertion that her HBA fees are not related to or measured by the actual cost of caring for the herd. Her agreement with Yoder is not an agistment agreement. Her property interest is solely in her shares, and her shares are only raw milk. Thus, the transaction between Yoder and Slippy is a down payment (BOS) reserving her shares and a fee for raw milk based on her consumption (HBA).

The BOS and HBA are nothing more than a set of guidelines for Slippy and Yoder in the exchange of raw milk for a pre-paid fee. Slippy's futile attempt to create an issue of fact by disputing her previous deposition testimony in regards to the amount of milk she received for her shares is neither convincing nor relevant. IDALS is correct in noting the questions posed in the deposition were clear and Slippy repeatedly and consistently equates her shares to gallons of raw milk, even when questioned by her own attorney. Nonetheless, whether her shares were measured in the form of gallons of raw milk or by a percentage of the total amount of raw milk produced by Yoder's herd is immaterial. The substance of the agreement is still an exchange of raw milk for consideration, which is the legal definition of a sale.

Therefore, the Court hereby finds that Slippy's transactions with Yoder constitute a sale of raw milk prohibited by Iowa Code §192.103. IDALS' interpretation of the BOS and HBA as a sale of raw milk accurately reflects the substance of the agreements. Therefore, Defendant's Motion for Summary Judgment on the grounds that Slippy's contractual arrangement constitutes a sale of raw milk prohibited by Iowa law is **GRANTED.**

4. Is Defendant entitled to summary judgment as a matter of law on Plaintiff's claim that IDALS' action violates her inalienable right to possess, use, and enjoy one's property?

In her Petition, Slippy claims IDALS actions violate the Inalienable Rights Clause and Unenumerated Rights Clause in Article 1, sections 1, 9 and 25 of the Iowa Constitution by interfering with her right to possess, use, and enjoy her property. The Inalienable Rights Clause states: "All men are, by nature, free and equal, and have certain inalienable rights-among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. 1 § 1. The Inalienable Rights Clause has been interpreted by the court as a method by which the drafters of the Constitution secured common law rights that pre-dated the constitution. *Gacke v. Pork X-tra, L.L.C.*, 684 N.W. 2d. 168, 176 (Iowa 2004). While the courts have recognized these rights, also known as natural rights, neither the Inalienable Rights Clause nor Unenumerated Rights Clause has ever been interpreted to be absolute. *Id.*

The rights protected by the Inalienable Rights Clause are subject to reasonable regulation by the state's exercise of police power to protect the public welfare. *Id.* (citations omitted). The Inalienable Rights Clause "gives no right to own property as such, free from regulation." *May's Drug Stores v. State Tax Commission,* 242 Iowa 319, 329 (1951). "The clause does not prevent all legislative action taken pursuant to the police power that benefits the community and impacts an inalienable right." *Johnson v. American Leather Specialties Corp.*, 578 F. Supp. 1154, 1176 (N.D. Iowa 2008), citing *Gacke* at 176. Rather, it provides protection only from arbitrary and unreasonable government action that impacts an inalienable right. *Atwood v. Vilsack,* 725 N.W. 2d. 641, 652 (Iowa 2006). "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Benschoter v. Hakes,* 8 N.W. 2d. 481, 486 (Iowa 1943).

Slippy's claims are substantive due process claims and challenges under Iowa Const. Art. 1 § 9, known as the Unenumerated Rights Clause, are evaluated in the same manner as her Inalienable Rights claims. An inquiry into the validity of a statute under a substantive due process challenge is a two step process. First, the court must determine "the nature of the rights involved," *State v. Seering,* 701 N.W. 2d. 655, 662 (Iowa 2005). If the right in question is a fundamental right, it is protected and the court applies a strict scrutiny standard. *American Leather Specialties* at 1177. If the right involved is not a fundamental right, the statute need only pass a rational basis test. *Id.* In all instances, the challenger must prove the statute is unconstitutional "beyond a reasonable doubt." *Seering* at 661. Indeed, this burden is a heavy one as "statutes are cloaked with a presumption of constitutionality" and if the statute is capable of being construed in multiple interpretations, the court will adopt the construction which is constitutional. *Id.*, citing *State v. Hernandez-Lopez,* 639 N.W. 2d. 226, 233 (Iowa 2002).

In all instances, Slippy must show that the challenged statute impacts the right she is asserting. *American Leather* at 1177. If the court determines the right(s) Slippy seeks to protect are fundamental, the statute must be narrowly tailored to serve a compelling government interest. *State v. Groves,* 742 N.W. 2d. 90, 92 (Iowa 2007). If the right is not fundamental, then the statute merely must be a "reasonable fit between government interest and the means utilized to advance that interest. *Id.* citing *Hernandez-Lopez* at 238.

To ensure constitutional claims are properly considered, "claims involving fundamental rights must identify the claimed right with accuracy and specificity so that our analysis proceeds on appropriate grounds." *Seering* at 663, citing *Bowers v. Polk County Bd. of Supervisors,* 638 N.W. 2d. 682, 694 (Iowa 2002). In addition, an asserted right must be, objectively, "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702, 720-721 (1997), citations omitted. Traditionally, Iowa courts have followed the Supreme Court's line when evaluating rights that are asserted as fundamental. Both courts are reluctant to expand the scope of substantive due

process because of the limited guidance in our jurisprudence. *Id.* at 720. See also *In re Detention of Cubbage*, 671 N.W. 2d. 442 (Iowa 2003)

Substantive due process only protects individuals from the most shocking and offensive government intrusions. *State v. Smokers Warehouse Corp.*, 737 N.W. 2d. 107, 111 (Iowa 2007). It is "reserved for the most egregious governmental abuses against legal or property rights, abuses that shock the conscience or otherwise offend.... judicial notions of fairness... [and that are] offensive to human dignity." *Id.* citing *Blumenthal Inv. Trusts v. City of West Des Moines*, 635 N.W. 2d. 255, 265 (Iowa 2001); *Rivkin v. Dover Twp. Rent Leveling Bd.*,671 A. 2d. 567, 575 (1975). When it comes to meeting these requirements, "the collective conscience of the United States Supreme Court is not easily shocked." *Id.* Classification of a right as fundamental is reserved only for the most blatant intrusions of an individual's privacy and bodily integrity. *Id.* There is no clear test to determine if an asserted right is fundamental. *Cubbage* at 447. Thus, both the Supreme Court and the Iowa courts proceed with extreme caution when expanding substantive due process rights.

On one hand, Slippy clearly and concisely states the rights she seeks to protect, which are listed in her Petition as the rights to own personal property in the form of a cow, to consume the raw milk produced by her cow, to enter into a boarding contract with a farmer to tend to her personal cow, and the right to enter into a services contract with a farmer to convert raw milk from her personal cow into other raw milk dairy products. On the other hand, we cannot analyze those issues as fundamental rights because IDALS concedes it has no jurisdiction to regulate her participation in any of those activities and the undisputed facts indicate IDALS has not intruded upon the rights Slippy asserts. The Court agrees with Defendant, that the rights Slippy states she is seeking to protect "is not the scenario that is before the court." *Defendant's MOA, page 15.* It has already been determined that Slippy's ownership interest is not in the form of a cow or even part of a cow, but in raw milk produced by Yoder's cows. The transaction in which Slippy obtains her milk is not through a BOS to purchase a cow or an HBA to board that cow. The undisputed facts show the documents executed by Yoder and Slippy constitute an animal leasing scheme that does not result in Slippy acquiring any property rights in a cow or paying for the board and care of a cow. As previously noted when the court addressed the issue of standing, it is undisputed that IDALS has not and is not regulating Slippy's purchase of or consumption of raw milk.

Slippy is correct in her assertion that Iowa courts have a long history or protecting substantive due process rights. Although Slippy provides a multitude of case law describing fundamental rights such as the right to marital privacy and the right to have children, she provides no legitimate legal authority supporting her assertion that she has the fundamental substantive due process right to engage in an animal lease agreement for the sole purpose of purchasing and consuming raw milk, or that Iowa has shown a willingness to expand the narrow definition of fundamental rights. Plaintiff's citation of an English common law case from 1777 regarding boarding and pasturing of livestock in an attempt to show agistment agreements are deeply rooted in our Nation's

history and traditions and should be granted status as a fundamental right is hardly convincing.

Furthermore, it is irrelevant because as previously noted, Slippy's and Yoder's agreement is an "agistment agreement" in name only. Slippy does not dispute IDALS' argument that the courts are wary of expanding fundamental rights. *Cubbage* at 447. Today, this court finds an English common law case from 1777 and Plaintiff's anecdotal and unsupported assertions are not an adequate basis for expansion of substantive due process rights to include the right to enter into an animal leasing agreement for the purchase of raw milk. Even if the court were to find IDALS had infringed upon the rights Slippy asserts, this Court does not find IDALS alleged intrusion upon Slippy's consumption of raw milk or agistment agreement as one that "shocks the conscience" or is "offensive to human dignity."

Slippy's argument that any legislative impact on liberty interests must be narrowly tailored to address a compelling government interest assumes this Court would find she actually holds a property interest in a cow or that she has an inalienable right to purchase raw milk. As this court finds Slippy's right to enter into agreements for the purchase of raw milk is not fundamental right, she must show beyond a reasonable doubt that the State's actions in regulating the sale of raw milk are arbitrary and unreasonable. *Atwood* at 652. But Slippy again mischaracterizes the conduct IDALS seeks to regulate. Iowa Code § 192.103 is a prohibition of the sale of raw milk, and Slippy has not shown beyond a reasonable doubt that Iowa Code § 192.103, or IDALS' interpretation of her agreements with Yoder as a sale of raw milk, is not a reasonable fit to promote the government's interest in public health and welfare. *Hernandez-Lopez* at 238.

The Court defers to State agency determinations on matters of public health and welfare. *Cannon v. Board of Psychology Examiners of the State of Iowa,* 707 N.W. 2d. 336 (Iowa App. 2005). The IDPH has an interest in limiting the number of Iowans who consume raw milk. See Defendant's Appendix pages 2-3. Prohibiting the sale of raw milk is a reasonable means to achieve that goal. Iowa has a long and vast line of case law that specifically allows government regulation of individual rights, including property rights, in the name of public health and welfare, including another case involving the government's public health interest in prohibiting the sale of raw milk. *Johnson County* at 87. See also *Iowa Coal Min. Co. v. Monroe County,* 494 N.W. 2d. 664 (Iowa 1993) (stating zoning regulations are within a County's power to regulate the health and welfare of the community, despite the regulation's impact on the use of property); *Borlin v. Civil Service Com'n of City of Council Bluffs,* 338 N.W. 2d. 146 (Iowa 1983) (holding the fundamental right to free enterprise is subject to reasonable government regulation to protect public health and welfare); *State v. Kirby,* 94 N.W. 2d. 254 (1903) (finding "preservation of public health is of paramount importance to the state at large"); *State v. Hartog*, 440 N.W. 2d. 852 (Iowa 1989)(finding Iowa statute requiring the use of a seat belt did not violate right to privacy).

The Iowa legislature has granted IDALS the power to regulate the sale of raw milk for the purpose of protecting public health and welfare. *Johnson County* at 87. See also Iowa Code § 159.6(7). Slippy has not shown beyond a reasonable doubt that she has a fundamental right to enter into private agreements for the purpose of purchasing raw milk. She has not shown Iowa Code § 192.103 is an unreasonable or arbitrary means for IDALS to limit the number of people exposed to raw milk for the protection of public health and welfare. As Slippy has not met the burden required by law, IDALS Motion for Summary Judgment as a matter of law on her claim that IDALS' actions violated her inalienable and unenumerated rights is **GRANTED.**

5. Is IDALS entitled to summary judgment as a matter of law on Slippy's claim that IDALS' action violates her inalienable right to privacy?

In her Petition, Slippy argues she has an inalienable right to consume raw milk produced by her cow, consume the foods of her choice, and be responsible for decisions regarding her health because these activities are protected by her fundamental right to privacy. The right to privacy is a substantive due process right and as such, the rights Slippy is seeking to protect must be clearly and accurately defined. *Seering* at 663.

If Slippy is seeking substantive due process protection of the conduct IDALS seeks to regulate, then she has not clearly articulated or defined that right. She asserts IDALS' action interferes with her rights as a parent, and claims unless the government can establish her as an unfit parent, then it has no business telling her what she can and cannot feed to her children, particularly raw milk. Yet again, Slippy's argument woefully misses the mark. The activity IDALS is regulating is the sale of raw milk, and in pursuit of this regulatory action IDALS has defined Yoder's transactions with Slippy as a sale of raw milk. Thus, the activity Slippy is truly seeking to protect is the right to enter into a contractual arrangement to purchase raw milk.

As a substantive due process right, an assertion of privacy rights follows the same analysis previously described in this ruling. First, the right must be defined. If the right is a fundamental one, the strict scrutiny standard applies and the government must demonstrate the regulation is narrowly tailored to serve a compelling government purpose. *Santi v. Santi,* 633 N.W. 2d. 312, 317 (Iowa 2001). "If the right at issue is not deemed fundamental, a reviewing court merely applies the familiar rational basis test to determine whether a reasonable fit exists between the government's purpose in enacting the statute and the means chosen to advance it." *Id.* citing *State v. Klawonn,* 609 N.W. 2d. 515, 519 (Iowa 2000).

"The right to privacy in this context simply means the freedom of choice to engage in certain activities." *Hartog* at 854. The U.S. Supreme Court has defined activities protected by the right to privacy "to include only child rearing and education, family relationships, procreation, marriage, contraception, and abortion." *Id.* at 854-855. The right to privacy is not expressly articulated in the Constitution, but is inferred. *State*

v. Price, 237 N.W. 2d. 813, 817 (Iowa 1976). The zone of privacy rights "encompasses and protects the personal intimacies of the home, families, marriage, motherhood, procreation, and child rearing." *Id.* at 818, citing *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973). In other words, not all regulations that impact an individual's freedom of choice to engage in certain activities are protected by the right to privacy. Only regulations with an impact on the most intimate decisions established by the U.S. Supreme Court as fundamental rights deserve strict scrutiny. *Id.* See also *Bowers v. Hardwick,* 478 U.S. 186, 191 (1986).

Both the U.S. Supreme Court and the Iowa Courts have refused to expand the fundamental right to privacy to other activities and there is "considerable reluctance to recognize new rights of privacy that stray from those categories already established." *Hartog* at 855. Even though the U.S. Supreme Court and Iowa courts have recognized certain aspects of child rearing as fundamental rights, they have declined to expand those rights to all aspects of child rearing. See *Wilson v. City of Council Bluffs,* 110 N.W. 2d. 569, 572 (Iowa 1961) (finding City's addition of fluoride to city water supply to prevent dental caries in children was within the City's police power to benefit the public health). For obvious reasons, not all conduct within the home is protected by the right to privacy. *State v. Coil,* 264 N.W. 2d. 293 (Iowa 1978) (an adult's right to privacy does not include sexual conduct with minors in violation of state statutes); *State v. Henderson,* 269 N.W. 2d. 404 (1978) (the protected zone of privacy for intimate matters did not extend to prostitutes plying their trade in their own home).

The rights Slippy articulates in her Petition and Resistance include the right to raise her family without government intrusion, the right to choose what foods to consume, and the right to be free from government interference with her health. But in support of her claim, Slippy yet again mischaracterizes her ownership interest as one of a single cow as a basis for her assertion that she has a right to consume milk from her cow in the privacy of her home. Despite Slippy's claim that the State is making an issue out of her consumption of the food of her choice, IDALS correctly notes it does not have jurisdiction to regulate Slippy's consumption of raw milk and they have not attempted to do so. There are no disputed facts in this regard.

Slippy argues that the court should expand the narrow list of established privacy rights to include the right to make decisions regarding her food and to consume the food of her choice. But her attempt to guard the right to consume raw milk as a fundamental right to privacy is blocked by the contractual arrangement IDALS is actually regulating. A statute is not unconstitutional on its face unless it is unconstitutional under every set of conceivable facts. *In Interest of Ponx,* 276 N.W. 2d. 425, 432 (Iowa 1979). A statute is "ordinarily not unconstitutional as applied unless it is unconstitutional as applied to the specific factual situation before the court." *Id.* quoting *Moorman Mfg. Co. v. Bair,* 254 N.W. 2d. 737, 755 (Iowa 1977).

In asserting her right to privacy, Slippy is not challenging Iowa Code § 192.103 on it's face. She is challenging IDALS application of the regulation to her. IDALS is not using Iowa Code § 192.103 as a means to infringe upon her alleged right to consume

raw milk. IDALS is enforcing the regulation prohibiting the *sale* of raw milk. The specific factual situation before the court is one of a government agency interpreting Slippy's arrangement with Yoder as a sale of raw milk proscribed by law. Slippy provided no legal authority that provides any guidance or support to the expansion of the fundamental right to privacy to include business transactions. Nor, for that matter, did she provide any legal authority or evidence other than her own opinion that the right to consume the food of her choice should be added to the narrow list of fundamental rights

Since the right to enter into her agreements with Yoder is not a fundamental right, IDALS action need only pass the rational basis test. To pass the rational basis test, IDALS need only show their actions are a "reasonable fit between the government interest and the means utilized to advance that interest." *In re Cubbage* at 446. Under the rational basis test, regulations are presumed to be constitutional. *Miller v. Board of Medical Examiners of the State of Iowa,* 609 N.W. 2d. 478, 482 (Iowa 2000). This presumption "can only be overcome by proof the law is patently arbitrary and bears no rational relationship to a legitimate government interest." *Id.*

The State's purpose behind Iowa Code § 192.103 is to limit the public's access to unpasteurized milk due to the potentially harmful effects on public health. Defendant's Appendix, pages 2-3. IDALS is empowered by the Legislature and obligated to the citizens of Iowa to define and enforce the provisions of the Code. Both IDALS and IDPH have jointly monitored food safety in the State of Iowa and continue to conclude that public distribution of raw milk would be adverse to public health. Slippy bears the heavy burden of proving beyond a reasonable doubt that IDALS actions are not rationally related to the goal of limiting public access to raw milk. *Miller* at 482. She falls far short of meeting this burden.

Slippy's arguments against the rational basis of IDALS' action consist of her and Peter Kennedy's completely unqualified and unscientific opinions that pasteurized milk is more dangerous than raw milk and that since she is consuming milk in her own home her activity is private and has no impact on public health. The only actual legal authority Slippy provides is Missouri state court opinion from *1926.* See Plaintiff's MOA in Opposition to Summary Judgment, page 36 (emphasis added) referencing *State ex. rel.Knese v. Kinsey,* 314 Mo. 80 (Mo. 1926). *Kinsey* is not binding on this Court. More importantly, 1926 is three (3) years before the discovery of antibiotics, and more than forty (40) years before the U.S. Department of Health and Human Services began issuing reports on the dangers of smoking cigarettes. See "A Report of the Surgeon General: How Tobacco Smoke Causes Disease," available at http://www.surgeongeneral.gov/library/tobaccosmoke/factsheet.html. Clearly, our knowledge and treatment of issues of public health have seen drastic changes since 1926. Even if Slippy were able to provide a multitude of scientific evidence that raw milk is perfectly safe, this is beside the point. The Court gives agency determinations as to matters of public health and welfare considerable deference. *Cannon.*

Given the unwillingness of the court to expand the definition of fundamental privacy rights to areas other than the most shocking intrusions on the most intimate activities, extension of the doctrine to Slippy's contractual arrangements would be inappropriate. IDALS' Motion for Summary Judgment as to Slippy's inalienable right to privacy claim is **GRANTED.**

6. Is IDALS entitled to summary judgment as a matter of law on Slippy's claim that IDALS action violates her inalienable right to contract?

Slippy claims IDALS actions interfere with her right to contract under Article 1, section 21 of the Iowa Constitution, and the U.S. Constitution Article 1, section 10. Both are known as the Contracts Clause. The Contracts Clause of the Iowa Constitution prohibits the passage of legislation that impairs the obligations of contracts. Iowa Const. art. 1, § 21. In their MOA in Support of Motion for Summary Judgment, IDALS challenged Slippy's claims on several grounds, including that the Contracts Clause only protects contracts entered into before the legislation was enacted, and that her contract is void because it is in contravention of public policy.

Slippy did not respond to either of these arguments in her Resistance. Iowa Rule of Civil Procedure 1.981(5) requires the adverse party to set forth specific facts showing there is a genuine issue for trial. If the adverse party fails to do so, those claims are effectively conceded and waived. Therefore, those claims related to the Contracts Clause in Slippy's Petition are dismissed. Thus, the only remaining issue on Slippy's right to contract claim is whether the Contracts Clause applies to the actions of an administrative agency.

There is not one single legal authority that applies the Contracts Clause analysis to private contracts entered into after the challenged legislation was enacted. Therefore, IDALS should be granted summary judgment on this basis alone, even if Slippy hadn't waived that argument. Her contract was always void because Iowa Code 192.103 existed long before her agreements with Yoder were executed. The landmark case on Contracts Clause protection is *Equipment Mfrs. Institute v. Janklow*, 300 F. 3d. 842 C.A. 8 (SD) 2002. The Contracts Clause is not absolute or literal, and does not protect private contracts entered into after a regulation has been promulgated. *Hawkeye Commodity Promotions v. Miller*, 432 F. Supp. 2d. 822, 841 (N.D. Iowa 2006). "Plaintiff may not complain about the enforcement of a police power to which it agreed." *Fort Dodge D.M. & S. Ry. v. American Commodity Stores Corp.*, 131 N.W. 2d 515, 522 (Iowa 1964). Thus, IDALS is entitled to summary judgment on this basis alone.

Slippy executed her agreements with Yoder in 2009 and 2010, and Iowa Code § 192.103 or its virtually identical predecessor were enacted decades before her agreements, rendering her agreements with Yoder invalid. However, even if this rule did not apply, the State may still regulate private contracts under certain circumstances.

"Preliminarily, we note that the guarantee of the Contract Clause in the federal and state constitutions must yield to a reasonable exercise of the police power for the public good. *Adair Benev. Soc. v. State, Ins, Div.*, 489 N.W. 2d. 1, 5 (Iowa 1992). Police power "is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 241 (1978). Without this exception, "one would be able to obtain immunity from state regulation by making private contractual agreements." *Id.*, quoting *Exxon Corp. v. Eagerton,* 462 U.S. 176, 190 (1983).

Slippy argues that since the legislature cannot enact laws in opposition to the Contracts Clause, the legislature also cannot delegate the power to do so to an administrative agency. For their part, IDALS argues in both their Motion and Reply that the Contracts Clause protects private contracts only from legislative action, not the actions of an administrative agency. Neither argument is entirely correct in form or as applied to this case. As noted above, the Contracts Clause is not absolute and must yield to the state's police power for the public good. *Adair Benev. Soc.* at 5. The legislature most certainly can legitimately delegate that police power to administrative agencies, even if it interferes with private contracts. *Fort Dodge* at 523. "We may interfere only if the acts or program ...are so arbitrary and unreasonable as to be beyond the police power of the State." *Id.* However, if the agency action affects private contracts it is subject to the protection of the Contract Clause and it must pass the same test the court applies to legislation.

The Contracts Clause of the Iowa and U.S. Constitution are substantially similar, and the same legal analysis applies to both. The 8th Circuit has adopted a 3-prong test for determining whether a statute violates the Contract Clause of the U.S. Constitution. Since the language of the Contracts Clause in the Iowa Constitution is substantially similar, the test guides our analysis. The first prong is a determination as to whether the state law has operated as a substantial impairment on pre-existing contractual relationships. *Hawkeye Commodity Promotions* at 842. If not, the law does not violate the Contracts Clause and there is no need to address the remaining prongs. *Id.* If it does operate as a substantial impairment, the State must have a substantial and legitimate public purpose behind the legislation. *Id.* If a substantial and legitimate purpose has been identified, the court must determine if the resulting adjustment of rights and obligations under the contract is "based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* citing *Equip. Mfrs. Inst. v. Janklow,* 300 F. 3d. 842, 850 (8th Cir. 2002).

Iowa Code § 192.103 operates as a substantial impairment on Slippy's contracts with Yoder, because any statute the results in the total destruction of a contract is considered a substantial impairment. *Id.* at 847. The disputed issue is whether IDALS has a substantial and legitimate public purpose behind their enforcement actions against Yoder and whether their actions are reasonable. To meet this burden, IDALS must show the protective regulation address a "broad societal interest rather than a narrow class." *Janklow* at 859 quoting *Allied Structured Steel Co.* at 249. IDALS asserts

their regulation of the sale of raw milk is to protect the public health due to the potential presence of harmful bacteria in raw milk. Iowa Code § 192.103 is not directed at a narrow class of individuals, but benefits all citizens. *Janklow* at 861. We find that IDALS' rationalization is not *post hoc* and is supported by the evidence. *McDonald's Corp. v. Nelson,* 822 F. Supp 597, 609 (S.D. Iowa 1993). As previously mentioned in this Ruling, the evidence presented by Slippy disputing the public health issues posed by raw milk is not credible and is supported only by her allegations.

Since a legitimate public purpose has been established, the next inquiry is whether the resulting adjustment of rights and responsibilities of the parties to the contract is reasonable and appropriate to the identified public purpose. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. 400, 412 (1983). When the contract in question involves only private parties, as it does in this case, the courts give wide and proper deference to legislative judgment as to the reasonableness of the restriction. *Id.* at 412-413. A key question as to whether the restriction is reasonable is whether the field involved is heavily regulated. *Id.* at 414. The agricultural industry is heavily regulated in Iowa as it involves everything from soil and water conservation, sale and care of livestock, local zoning regulations, food safety issues, and more. Furthermore, Slippy's contracts with Yoder expressly recognize the state regulation on the very object of their agreements in the provisions regarding whether they are meant to be interpreted as a sale of raw milk. The inquiry into the level of regulation of the industry is relevant to foreseeability by the parties that the contract may be subject to government regulation. *Id.* If the interference with the contract was foreseeable, it is generally considered reasonable.

Slippy clearly knew at the time she executed her agreements with Yoder that the sale of raw milk was illegal and she was operating in a highly regulated industry. Slippy *definitely* knew at the time she entered her second agreement with Yoder that IDALS interpreted her transactions with Yoder as a sale of raw milk. She cannot now say she did not foresee the potential for government intervention. Nor can we say Iowa Code § 192.103 is an unreasonable means to achieve the legitimate public purpose, particularly given the court's deference to the judgment of the legislature and the agency. *Energy Reserves Group* at 412-413. Therefore, IDALS interference with her agreements was a proper exercise of the police power and is a reasonable means to achieve the identified legitimate public purpose.

Slippy's actions as noted above also strongly support IDALS argument that Slippy's contracts are void as to public policy because they blatantly indicate the parties had full knowledge that their actions were illegal. *McBreary v. United States Taxpayers Union,* 668 F. 2d. 450 (8th Cir. 1982). A court "ought not enforce a contract which tends to be injurious to the public or contrary to the public good." *Rogers v. Webb,* 558 N.W. 2d. 155, 157 (Iowa 1997), citations omitted. Slippy waived IDALS' argument on this issue, does not dispute, and indeed cannot dispute that she knew, at the very least, that her 2010 agreement with Yoder would be interpreted as an illegal sale of raw milk.

"A promise or other form of agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." *Mincks Agri Center, Inc. v. Bell Farms, Inc.*, 611 N.W. 2d. 270, 275 (Iowa 2000), citations omitted. A contract intended to aid in effecting a transaction prohibited by law is void, and the prohibited act need not be criminal or even penalized. *Dodson v. McCurnin,* 160 N.W. 2d. 927, 929 (Iowa 1917). Therefore, even if Slippy hadn't waived her argument against IDALS assertion that her contracts are void as to public policy, she would be unsuccessful.

IDALS motion for summary judgment as a matter of law as to Slippy's right to contract claim is **GRANTED.**

7. **Is Slippy entitled to have her contract with Yoder reformed by the court to conform to their lawful intent?**

In both her Petition and Resistance, Slippy requests the Court reform her documents to avoid having them construed as an illegal sale of raw milk. Slippy is correct in noting the Court may reform agreements to reflect the intent of the parties. *Akkerman v. v. Gersema,* 149 N.W. 2d. 856, 859 (Iowa 1967). However, reformation is a method the Court applies in equity to prevent unjust enrichment to one party or the other as a result of mistake. *State, Dept. of Human Services ex. rel. Palmer v. Unisys Corp.*, 637 N.W. 2d. 142, 151 (Iowa 2001). Reformation is employed in the discretion of the Court only when it is absolutely essential to the ends of justice. *Akkerman* at 861.

Equity will reform a contract only when there is no doubt or ambiguity that a mistake occurred. *Akkerman* at 859. Slippy must establish by clear and convincing proof that the writing does not express the true agreement of the parties. *Id.* Absent this showing the court will not "make contracts" for the parties but must defer to the written instrument. *Id.* Unless Slippy can show there was a mutual mistake by Yoder and herself during formation of the contract, reformation is inappropriate. *Betz v. Swanson,* 200 Iowa 824 (Iowa 1925).

Slippy has not met this stringent burden. In fact, she does not even point to any specific provision in the contract that could be considered a mistake. The written terms of the contract are not disputed by IDALS, and Yoder is not before the court to defend his interests in the contract. Reformation is a remedy in equity associated with a claim of action brought by one party of a contract against another. It does not apply in instances where a contract is found void as a matter of law. The whole point of reformation is to change the terms of a contract to reflect the true intent of the parties, yet the only other party to Slippy's agreements, Yoder, is not present in this action. This is not an appropriate situation for the Court to exercise the discretion to reform a contract. Slippy's request for reformation of her contracts with Yoder is **DENIED.**

CONCLUSION

IDALS' Motion for Summary Judgment on the basis that Slippy lacks standing to maintain her cause of action is **GRANTED.**

Slippy's contractual arrangements with Yoder constitute a sale of raw milk prohibited by Iowa Code § 192.103.

IDALS' Motion for Summary Judgment on Slippy's claims if violation of her inalienable right to property, privacy, and contract is **GRANTED.**

Plaintiff has not met the burden required for reformation of her contracts with Yoder.

RULING

IT IS THEREFORE ORDERED THAT Defendant's Motion for Summary Judgment is **GRANTED.** Plaintiff's Petition is hereby dismissed. Costs are assessed to Plaintiff.

Clerk to notify

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Judge, Sixth Judicial District of Iowa

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TAB 25

Her Majesty The Queen *Appellant*

v.

Jim A. McClurg *Respondent*

INDEXED AS: McCLURG *v.* CANADA

File No.: 20751.

1989: November 29; 1990: December 20.

Present: Dickson C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Income Tax — Dividends — Attribution — Dividends declared and allocated to shareholders of a share class pursuant to discretion of directors — Other classes of shares not participating in dividend — Whether portion of dividend properly attributable to other classes of shares — Income Tax Act, S.C. 1970-71-72, c. 63, s. 56(2).

Company law — Dividends — Discretionary dividend as declared and allocated at discretion of directors — Whether derogation of common law with respect to nature of shares or directors' duties — Whether permitted by Saskatchewan Business Corporations Act — Business Corporations Act, R.S.S. 1978, c. B-10, ss. 24(4), 40, 97, 234.

Respondent and his partner were the only directors of a closely held company incorporated under the Saskatchewan *Business Corporations Act*. The Articles of Incorporation provided for three categories of shares: Class A which are common, voting and participating shares; Class B which are common, non-voting and participating where authorized by the directors; and Class C which are preferred, non-voting shares. All three classes of shares carried "the distinction and right to receive dividends exclusive of other classes of shares in the said corporation". The two directors received no dividends on either their class A or class C shares during 1978, 1979 and 1980 but received salaries, bonuses, and bonus entitlements. Their wives, who held Class B shares, were voted a declaration and distribution of dividends amounting to $10,000 each in each of these

* Chief Justice at the time of hearing.

Sa Majesté la Reine *Appelante*

c.

Jim A. McClurg *Intimé*

RÉPERTORIÉ: McCLURG *c.* CANADA

N° du greffe: 20751.

1989: 29 novembre; 1990: 20 décembre.

Présents: Le juge en chef Dickson* et les juges Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier et Cory.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Impôt sur le revenu — Dividendes — Attribution — Dividendes déclarés et répartis entre les actionnaires d'une catégorie d'actions en vertu du pouvoir discrétionnaire des administrateurs — Les autres catégories d'actions ne participaient pas au dividende — Une partie du dividende pouvait-elle légitimement être attribuée aux autres catégories d'actions? — Loi de l'impôt sur le revenu, S.C. 1970-71-72, ch. 63, art. 56(2).

Droit des sociétés — Dividendes — Dividende discrétionnaire déclaré et réparti à la discrétion des administrateurs — Y a-t-il dérogation à la common law en ce qui concerne la nature des actions ou les obligations des administrateurs? — Cela était-il autorisé par la Business Corporations Act de la Saskatchewan? — Business Corporations Act, R.S.S. 1978, ch. B-10, art. 24(4), 40, 97, 234.

L'intimé et son associé étaient les seuls administrateurs d'une société fermée constituée en vertu de la *Business Corporations Act* de la Saskatchewan. L'acte constitutif prévoyait trois catégories d'actions: la catégorie A composée d'actions ordinaires avec droit de vote et participantes; la catégorie B composée d'actions ordinaires sans droit de vote, mais participantes avec l'autorisation des administrateurs et la catégorie C composée d'actions privilégiées sans droit de vote. Les trois catégories d'actions comportaient «le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions de ladite société». Les deux administrateurs n'ont touché aucun dividende pour leurs actions de catégorie A ou C au cours des années 1978, 1979 et 1980 mais ils ont reçu des salaires, des primes ou des droits à des primes. Des dividendes ont été déclarés et distribués à leurs épouses, qui détenaient des actions de catégorie B, chacune d'elles ayant touché des dividendes au montant de 10 000 $ pour chacune de ces trois années. Mme

* Juge en chef à la date de l'audition.

three years. Mrs. McClurg had been actively involved in the firm's operations and had been paid a modest salary.

The Minister of National Revenue reassessed the respondent's income for 1978, 1979, and 1980 on the basis that $8,000 of the $10,000 in dividends attributed to Mrs. McClurg on her Class B shares was properly attributable instead to the respondent pursuant to s. 56(2) of the *Income Tax Act*. The Minister's opinion was that the dividends declared in each of the years in question should be attributed equally to all of the common shares, no matter of what class and notwithstanding the express condition attaching to the Class B shares that they shall carry the right to receive dividends exclusive of other classes of shares in the company. The reallocation was made on the basis of the number of Class A shares owned by the respondent in relation to the number of Class B shares owned by Mrs. McClurg. The respondent's appeal to the Tax Court of Canada was dismissed. The respondent further appealed from the decision of the Tax Court judge by way of an action commenced in the Federal Court of Canada, Trial Division. The appeal was allowed. The Minister's appeal to the Federal Court of Appeal was dismissed.

At issue here was whether the dividends received by Mrs. McClurg in respect of her Class B common shares should be attributed in part to the respondent. A preliminary issue was whether the discretionary clause constituted a valid derogation to the common law rule of equality of distribution of dividends or whether it was permitted under the Saskatchewan *Business Corporations Act*.

Held (Wilson, La Forest and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Sopinka, Gonthier and Cory JJ.: Discretionary dividend clauses may be validly used because they are not expressly prohibited by the Act and are not contrary to common law or corporate law principles.

The power to pay dividends is an integral component of the Act's broad grant of managerial power for directors and is expressly limited by restrictions in much the same way as at common law. It is also qualified in that the general managerial power, which rests in the directors of a company, is fiduciary in nature and so must be exercised in good faith and in the best interests of the company.

McClurg avait participé activement aux opérations de la société et avait touché un modeste salaire.

Le ministre du Revenu national a établi une nouvelle cotisation relativement au revenu de l'intimé pour les années 1978, 1979 et 1980 en tenant compte du fait que des 10 000 $ attribués à Mme McClurg à titre de dividendes provenant de ses actions de catégorie B, 8 000 $ auraient plutôt dû être attribués à l'intimé conformément au par. 56(2) de la *Loi de l'impôt sur le revenu*. Le Ministre était d'avis que les dividendes déclarés pour chacune des années en question devraient être répartis également entre les actions ordinaires, quelle que soit leur catégorie et malgré la condition expresse rattachée aux actions de catégorie B, qui prévoit qu'elles comportent le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions de ladite société. La redistribution a été effectuée en fonction du nombre d'actions de catégorie A appartenant à l'intimé par rapport au nombre d'actions de catégorie B détenues par Mme McClurg. L'appel interjeté par l'intimé devant la Cour canadienne de l'impôt a été rejeté. Il a ensuite interjeté appel de cette décision d'un juge de la Cour de l'impôt en intentant une action devant la Cour fédérale du Canada, Section de première instance. L'appel a été accueilli. L'appel formé par le Ministre devant la Cour d'appel fédérale a été rejeté.

Le litige en l'espèce était de savoir si les dividendes reçus par Mme McClurg relativement à ses actions ordinaires de catégorie B devraient être attribués en partie à l'intimé. On a soulevé une question préliminaire qui était de savoir si la clause discrétionnaire constituait une dérogation valide à la règle de common law prévoyant la distribution égale des dividendes ou si cette clause était autorisée par la *Business Corporations Act* de la Saskatchewan.

Arrêt (les juges Wilson, La Forest et L'Heureux-Dubé sont dissidents): Le pourvoi est rejeté.

Le juge en chef Dickson et les juges Sopinka, Gonthier et Cory: Les clauses de dividende discrétionnaire peuvent être validement utilisées parce qu'elles ne sont pas expressément prohibées par la Loi et ne sont pas contraires aux principes de la common law ou du droit des sociétés.

Le pouvoir de verser des dividendes fait partie intégrante du pouvoir général de gestion conféré aux administrateurs par la Loi, qui impose expressément des restrictions à ce pouvoir, un peu comme c'était le cas en common law. Ce pouvoir est en outre limité par le fait que le pouvoir général de gestion conféré aux administrateurs d'une société est de nature fiduciaire et qu'il doit être exercé de bonne foi et au mieux des intérêts de la société.

Shares have an equal right to receive a dividend unless the Articles of Incorporation provide otherwise. Their division into classes is a necessary condition to any derogation of this presumption of equality either with respect to dividends or to other shareholder entitlements. Section 24(4)(*a*) is to ensure that shareholders are fully aware of their entitlements and privileges to the extent that the presumption of equality is rendered inapplicable. The determination of whether or not the share class rebuts this presumption is a simple factual inquiry. The Articles of Incorporation rebutted the presumption of equality here.

The entitlement to be considered for a dividend is more properly characterized in terms of a "right". A dividend is no less a "right" because it is contingent upon the exercise of the discretion of the directors to allocate the declared dividend between classes of shares. The directors are bound by their fiduciary duty to act in good faith for the best interests of the company in declaring and allocating any dividend. That duty is not circumvented by the discretionary dividend clause. Many shareholder rights may be qualified and contingent and the mere fact that they are fettered does not render them anything less than shareholder rights.

A discretionary dividend clause does not give rise to any inherent conflict between the duty of the directors and their self-interest. Their allocation of dividends pursuant to such a clause can be exercised in the best interests of the company. The fact that the directors may consider the identity of shareholders does not necessarily render the declaration invalid on the basis of a conflict of duty and self-interest. The dividend allocation clause simply divides conceptually what has been traditionally one decision into two components—declaration and allocation. The discretionary powers of the directors have always included both, subject to the provisions of the Articles of Incorporation.

Section 24(4)(*b*) of the Act recognizes that there must be shares entitled to receive a dividend if a dividend is declared. This principle is not defeated by a discretionary dividend clause because the identity of the class eligible for a dividend simply remains unknown until the allocation takes place. This conceptual division into declaration and allocation is not substantively different from any derogation from the presumption of equality in the payment of dividends.

Les actions ont un droit égal de recevoir un dividende à moins que l'acte constitutif ne prévoie le contraire. Le partage des actions en catégories constitue une condition nécessaire pour pouvoir déroger à la présomption d'égalité, à la fois en ce qui concerne le droit aux dividendes et les autres droits des actionnaires. L'alinéa 24(4)*a*) a pour objet d'assurer que les actionnaires connaissent pleinement leurs droits et privilèges de manière à rendre inapplicable la présomption d'égalité. La conclusion quant à la question de savoir si la catégorie d'actions réfute cette présomption résulte d'un simple examen des faits. L'acte constitutif a réfuté la présomption d'égalité en l'espèce.

C'est le droit d'être pris en compte pour le partage d'un dividende qu'il convient davantage de qualifier de «droit». Un dividende n'en est pas moins un «droit» parce qu'il dépend de l'exercice par les administrateurs de leur pouvoir discrétionnaire de répartir le dividende déclaré entre les catégories d'actions. Les administrateurs sont tenus, en vertu de leur obligation fiduciaire, d'agir de bonne foi, au mieux des intérêts de la société en question, lorsqu'ils déclarent et répartissent un dividende. Une clause de dividende discrétionnaire ne fait nullement disparaître cette obligation. Nombre de droits des actionnaires peuvent être restreints ou conditionnels et ces droits n'en constituent pas moins des droits des actionnaires même s'ils font l'objet de restrictions.

Une clause de dividende discrétionnaire n'entraîne pas en soi un conflit entre l'obligation des administrateurs et leur intérêt personnel. La répartition de leurs dividendes en vertu d'une telle clause peut se faire au mieux des intérêts de la société. La possibilité que les administrateurs tiennent compte de l'identité des actionnaires n'a pas nécessairement pour effet d'invalider la déclaration en raison d'un conflit entre leur obligation et leur intérêt personnel. La clause de partage des dividendes ne fait que diviser, sur le plan conceptuel, en deux éléments—déclaration et répartition— ce qui, traditionnellement, constituait une seule décision. Le pouvoir discrétionnaire des administrateurs a toujours comporté ces deux éléments, sous réserve des dispositions de l'acte constitutif.

L'alinéa 24(4)*b*) de la Loi reconnaît que lorsqu'un dividende est déclaré par une société, il doit exister des actions ayant droit à ce dividende. La présence de la clause de dividende discrétionnaire ne fait pas échec à cette règle parce que l'identité de la catégorie d'actions admissible à un dividende demeure tout simplement inconnue jusqu'au moment de la répartition. Cette division conceptuelle en déclaration et répartition n'est pas fondamentalement différente d'une dérogation à la présomption d'égalité dans le versement de dividendes.

It would be inappropriate for this Court to determine the validity of use of a discretionary dividend clause in the context of an income tax appeal. The Act is facilitative and allows parties to structure corporations as they wish subject to certain explicit exceptions. It also provides the means for a party aggrieved by the corporation—security holder, creditor, director or officer—to seek redress through the s. 234 oppression remedy. No interested party here lodged such complaint, presumably because all involved were satisfied with the way in which the directors were conducting its affairs. Furthermore, it is a well-established principle at common law that where shareholders are unanimously agreed to a transaction, inequality of treatment does not render it *ultra vires* the company.

The determination that the transaction occurred in the context of a director-shareholder relationship is dispositive. While it is always open to the courts to "pierce the corporate veil" in order to prevent parties from benefitting from increasingly complex and intricate tax avoidance techniques, a dividend payment does not fall within the scope of s. 56(2). The purpose of s. 56(2) is to ensure that payments which otherwise would have been received by the taxpayer are not diverted to a third party as an anti-avoidance technique. This purpose is not frustrated because, in the corporate law context, until a dividend is declared, the profits belong to a corporation as a juridical person. Had a dividend not been declared and paid to a third party, it would not otherwise have been received by the taxpayer. Rather, the amount simply would have been retained as earnings by the company. Consequently, as a general rule, a dividend payment cannot reasonably be considered a benefit diverted from a taxpayer to a third party within the contemplation of s. 56(2).

An allocation pursuant to a discretionary dividend clause is no different from the payment of a dividend generally. In both cases, but for the declaration (and allocation), the dividend remains part of the retained earnings of the company and is therefore not within the legitimate parameters of the legislative intent of s. 56(2).

The payments to Mrs. McClurg represented a legitimate *quid pro quo* and were not simply an attempt to avoid the payment of taxes. Her efforts expended in the

Notre Cour ne serait pas justifiée de se prononcer sur la validité de l'utilisation d'une clause de dividende discrétionnaire dans le cadre d'un pourvoi en matière d'impôt sur le revenu. La Loi a pour objet de faciliter les choses et de permettre aux parties, sous certaines réserves explicites, de structurer les sociétés comme elles le désirent. Elle fournit également à la partie lésée—peu importe qu'il s'agisse d'un détenteur de valeurs mobilières, d'un créancier, d'un administrateur ou d'un dirigeant—le moyen de demander réparation grâce au recours prévu à l'art. 234. Aucune des parties intéressées n'a déposé une telle plainte en l'espèce, probablement parce que toutes les personnes en cause étaient satisfaites de la manière dont les administrateurs la gérait. De plus, il est bien établi en common law que lorsque les actionnaires s'entendent unanimement sur une opération, celle-ci ne constitue pas un excès de pouvoir de la part de la société parce qu'il y a eu inégalité de traitement.

La conclusion que l'opération s'était produite dans le cadre des rapports existant entre les administrateurs et les actionnaires tranche la question. Bien qu'il soit toujours loisible aux tribunaux de «percer le voile corporatif» afin d'empêcher les parties de profiter de techniques d'évitement fiscal de plus en plus complexes, le versement d'un dividende n'est pas visé par le par. 56(2). Ce dernier a pour objet d'assurer que les paiements qui auraient autrement été reçus par le contribuable ne soient pas détournés au profit d'un tiers comme technique d'évitement fiscal. Cet objet n'est pas contrecarré parce que, dans le contexte du droit des sociétés, les profits appartiennent à la société en sa qualité de personne juridique tant qu'un dividende n'est pas déclaré. Si aucun dividende n'avait été déclaré ni versé à un tiers, il n'aurait pas non plus été touché par le contribuable. Ce montant aurait plutôt simplement fait partie des bénéfices non distribués de la société. Par conséquent, en règle générale, le versement d'un dividende ne peut raisonnablement être considéré comme un avantage détourné par un contribuable en faveur d'un tiers au sens du par. 56(2).

Une répartition effectuée conformément à une clause de dividende discrétionnaire ne se distingue pas du versement d'un dividende en général. Dans les deux cas, le dividende continuerait à faire partie des bénéfices non distribués de la société, si ce n'était de la déclaration du dividende (et de sa répartition), et, par conséquent, il n'est pas visé par les paramètres fixés légitimement par le législateur au par. 56(2).

Les versements effectués à Mme McClurg représentaient une contrepartie légitime et non simplement une tentative d'éviter le paiement de l'impôt. Les efforts

firm's operation, while not dispositive of the issue, was further evidence that the dividend payment was the product of a *bona fide* business relationship. If a distinction is to be drawn in the application of s. 56(2) between arm's length and non-arm's length transactions, it should be made between the exercise of a discretionary power to distribute dividends when the non-arm's length shareholder has made no contribution to the company (in which case s. 56(2) may be applicable), and those cases in which a legitimate contribution has been made.

Per Wilson, La Forest and L'Heureux-Dubé JJ. (dissenting): The separation of share ownership and control underlies many fundamental principles of corporate law. Among these are the principle that the directors and officers of a corporation owe a fiduciary duty to the corporation and the principle of equality of shares. More than just a mere contractual right, the principle of equality of shares developed as a measure of protection for the shareholder. Thus, when more than one class of shares was created, the directors were not free to discriminate arbitrarily between the classes when awarding a dividend.

Shareholder rights include the right to a dividend, the right to vote, and the right to participate in the distribution of assets upon dissolution of the corporation. These rights must attach to the corporation's shares and the shareholders may not agree to circumvent this principle.

A discretionary dividend clause that permits the directors of a corporation to choose which class is entitled to receive dividends to the exclusion of the other classes is invalid at common law. It contravenes the principle that the directors are not permitted to favour one class at the expense of the others. It also contravenes the principle that dividends attach to shares and not to shareholders because the directors would be making a discretionary allocation primarily on the basis of the identity of the shareholders. To allow discrimination on the basis of the identity of the shareholder ignores the separation that is supposed to exist between the corporation and its shareholders.

A discretionary dividend clause, if valid, would entail a number of problems. The shareholder would be completely dependent on the goodwill of the directors and the minority shareholder would be placed in a near impossible position if this goodwill were to be turned against that shareholder. It also places the director in a position where he cannot fulfill his fiduciary obligations

qu'elle a déployés dans l'exploitation de la société, même s'ils ne sont pas décisifs quant à la question soulevée dans le présent pourvoi, constituent néanmoins une preuve supplémentaire que le versement de dividendes était le résultat d'une relation d'affaires normale. Si une distinction s'impose aux fins de l'application du par. 56(2) entre les opérations effectuées avec ou sans lien de dépendance, il faut la faire entre l'exercice du pouvoir discrétionnaire de répartir des dividendes lorsque l'actionnaire ayant un lien de dépendance n'a fourni aucun apport à la société (auquel cas le par. 56(1) peut s'appliquer) et les cas où un apport légitime a été fourni.

Les juges Wilson, La Forest et L'Heureux-Dubé (dissidents): La séparation de la propriété et du contrôle des actions sous-tend plusieurs principes fondamentaux du droit des sociétés. Le principe selon lequel les administrateurs et les dirigeants d'une société ont une obligation de fiduciaire envers celle-ci et le principe de l'égalité des actions en sont des exemples. Étant plus qu'un simple droit contractuel, le principe de l'égalité des actions constitue une mesure de protection pour l'actionnaire. Ainsi, les administrateurs ne sont pas libres de distinguer arbitrairement entre les catégories au moment d'accorder un dividende, même lorsqu'il y a plus d'une catégorie d'actions.

Les droits d'un actionnaire comprennent le droit de recevoir un dividende, le droit de voter et le droit de participer au partage des actifs au moment de la dissolution de la société. Ces droits doivent se rattacher aux actions de la société et les actionnaires ne peuvent s'entendre pour faire échec à ce principe.

Une clause de dividende discrétionnaire qui permet aux administrateurs d'une société de choisir la catégorie qui a le droit de toucher des dividendes à l'exclusion des autres catégories est nulle sous le régime de la common law. Elle va à l'encontre du principe selon lequel les administrateurs ne peuvent favoriser une catégorie au détriment des autres. Elle est également contraire au principe voulant que les dividendes se rattachent aux actions et non aux actionnaires car les administrateurs feraient une répartition discrétionnaire en se fondant essentiellement sur l'identité des actionnaires. Permettre la discrimination en se fondant sur l'identité de l'actionnaire, c'est ne pas tenir compte de la séparation qui est censée exister entre la société et ses actionnaires.

Une clause de dividende discrétionnaire, lorsqu'elle est valide, engendrerait un certain nombre de problèmes. L'actionnaire dépendrait entièrement du bon vouloir des administrateurs et l'actionnaire minoritaire serait placé dans une situation presque impossible si ce bon vouloir devait jouer contre lui. Elle place également l'administrateur dans une situation où il ne peut remplir ses

to the corporation as a whole and so must be invalid at common law. The conflict of interest is heightened when the director happens to be a shareholder of a class to which dividends are awarded or from which some personal benefit is derived; the situation can be compared to the usurpation of a corporate opportunity properly belonging to the company.

Requiring the mode of distribution to be expressly set out in the Articles of Incorporation, which can only be amended by approval of the shareholders, is consistent with the fiduciary obligation. If the directors hold preferred shares, the common shareholders will have agreed to subordinate their dividend interest to the preferred class of shares based upon "full disclosure" of the maximum amount to which these preferred shares will enjoy priority. With a discretionary dividend clause, there is no such disclosure, since the amount and priority is left to be determined in the future, wholly at the directors' discretion.

If employees merit additional reward, the proper course to effect this is through some form of compensation other than a dividend. A dividend is a return on an investment. The directors, if they were to take into account the identity of shareholders when declaring a dividend, would be improperly exercising the discretionary dividend power.

The discretionary dividend clause, even if it were valid under the common law, would be insufficient to rebut the common law presumption of equality. All three classes of shares are defined in substantially the same manner with respect to their entitlement to dividends. Therefore, any difference between the shares concerning their right to receive dividends would clearly not derive from any differentiation between the shares; it would have to stem from the actions of the directors of the corporation. Such a right, therefore, would not derive from the share itself and would be invalid at common law.

Section 24(4)(*a*) of the Saskatchewan *Business Corporations Act* requires that the mode of distributing dividends be expressly provided for in the articles themselves. The section must be interpreted in accordance with the principles of the common law and, in particular, with the principle that shareholder rights be expressly provided for in the shares themselves. Any departure from this principle must be explicitly stated. Section 24(4)(*a*) does not clearly indicate an intent to provide corporate directors with a power which they did not

obligations de fiduciaire envers la société dans son ensemble et elle doit donc être nulle en common law. Le conflit d'intérêts est encore plus évident lorsqu'un administrateur est lui-même un actionnaire faisant partie d'une catégorie à laquelle des dividendes sont accordés ou d'où il tire un avantage personnel; cette situation peut se comparer à l'usurpation d'un privilège de la société qui appartient à cette dernière.

Exiger que le mode de distribution soit expressément énoncé dans l'acte constitutif, lequel ne peut être modifié qu'avec l'approbation des actionnaires, est conforme à l'obligation de fiduciaire. Si les administrateurs détiennent des actions privilégiées, les actionnaires ordinaires se seront entendus pour subordonner leur droit aux dividendes à la catégorie d'actions privilégiées moyennant «divulgation intégrale» du montant maximum jusqu'à concurrence duquel ces actions privilégiées auront priorité. Lorsqu'il y a une clause de dividende discrétionnaire, cette divulgation n'existe pas puisque le montant et la priorité en question seront déterminés subséquemment, à l'entière discrétion des administrateurs.

Si les employés méritent une récompense additionnelle, la bonne façon de procéder est de leur accorder une forme de rémunération autre qu'un dividende. Celui-ci est le rapport d'un investissement. Si les administrateurs devaient prendre en considération l'identité des actionnaires lorsqu'ils déclarent un dividende, cela constituerait un exercice abusif du pouvoir d'accorder un dividende discrétionnaire.

Même si la clause de dividende discrétionnaire était valide sous le régime de la common law, elle ne suffirait pas à réfuter la présomption d'égalité de la common law. Les trois catégories d'actions sont définies essentiellement de la même façon en ce qui concerne leur droit aux dividendes. Par conséquent, toute différence qui existe entre les actions concernant leur droit de recevoir des dividendes découlerait clairement non pas d'une différenciation entre les actions mais plutôt des actes des administrateurs de la société. Ainsi donc, un tel droit ne découlerait pas de l'action elle-même et serait invalide en common law.

L'alinéa 24(4)*a*) de la *Business Corporations Act* de la Saskatchewan exige que le mode de distribution des dividendes soit expressément prévu dans l'acte constitutif lui-même. Cet alinéa doit être interprété conformément aux principes de la common law qui prescrivent notamment que les droits de l'actionnaire doivent être expressément prévus dans les actions elles-mêmes. Toute dérogation à ce principe doit être prévue expressément. L'alinéa 24(4)*a*) n'exprime pas clairement l'intention de conférer aux administrateurs d'une société le pouvoir

otherwise have at common law. The use of the discretionary dividend clause is also inconsistent with the requirement in s. 24(3)(*b*) that at least one class of shares must be entitled "to receive any dividend declared by the corporation".

Even when the Act specifically provides that the directors may be given the discretion to determine the rights to be assigned to a series, this discretion is not unlimited. The shareholders can give the directors the power to issue series within a class and assign rights to those series but they may not agree to give the directors the discretion to interfere with their right to dividends or a return of capital by choosing to give another series priority. The rights assigned to series, unlike classes of shares, may be altered without amending the corporate constitution.

The statute contemplates that shareholders will be protected from changes being made to the rights attached to different classes of shares by virtue of the fact that such rights may only be amended by altering the corporate constitution. In theory, a shareholder can bring a suit if the directors are alleged to exercise their discretion improperly. This remedy, however, entails a significant burden and expense and is an inadequate means of protecting shareholders from the potential for abuse created by the presence of a discretionary dividend clause. The need for shareholder protection from abuse of the discretionary dividend clause becomes all the more apparent given the possibility that such a clause could be inserted in the Articles of Incorporation of a large, publicly held corporation.

The discretionary dividend clause has no socially useful purpose. Its only apparent purpose is to facilitate tax avoidance through "income-splitting" and this purpose hardly supports the need to allow corporations to be structured in this manner.

It would be inappropriate to return the money paid out in dividends to the corporation because the directors must be taken to have declared dividends in the corporation's best interests. The dividends, therefore, should be redistributed amongst the various classes of shares which must, absent a valid differentiation between the shares, share equally in the dividend.

A dividend payment does not fall within the scope of s. 56(2) of the *Income Tax Act* in the typical situation

qu'ils n'avaient pas autrement en vertu de la common law. Le recours à la clause de dividende discrétionnaire est également incompatible avec l'exigence de l'al. 24(3)*b*) selon laquelle au moins une catégorie d'actions doit avoir le droit «de recevoir tout dividende déclaré par la société».

Même lorsque la Loi prévoit expressément qu'on peut conférer aux administrateurs le pouvoir discrétionnaire de déterminer les droits à être assignés à une série, ce pouvoir discrétionnaire n'est pas illimité. Les actionnaires peuvent accorder aux administrateurs le pouvoir d'émettre des séries dans une catégorie donnée et conférer des droits à ces séries mais ils ne peuvent s'entendre pour accorder aux administrateurs le pouvoir discrétionnaire de porter atteinte à leur droit aux dividendes ou à un remboursement de capital en choisissant de donner priorité à une autre série. Les droits conférés aux séries, contrairement aux catégories d'actions, peuvent être changés sans qu'on modifie la constitution d'une société.

La loi prévoit que les actionnaires seront protégés contre les modifications apportées aux droits se rattachant aux différentes catégories d'actions en raison du fait que ces droits ne peuvent être changés que par la modification de la constitution de la société. En principe, un actionnaire peut intenter une poursuite s'il est allégué que les administrateurs exercent leur pouvoir discrétionnaire d'une façon inappropriée. Ce recours entraîne toutefois un fardeau et des frais importants et ne constitue pas un moyen adéquat pour protéger les actionnaires contre les abus auxquels la clause de dividende discrétionnaire peut donner lieu. La nécessité de protéger l'actionnaire contre l'usage abusif de la clause de dividende discrétionnaire devient encore plus évidente lorsqu'on envisage la possibilité d'insérer une telle clause dans l'acte constitutif d'une société dont les actions sont détenues par le public.

La clause de dividende discrétionnaire n'a aucune fin utile sur le plan social. Son seul but apparent est de faciliter l'évitement fiscal grâce au «fractionnement du revenu» et cela ne saurait justifier le besoin de permettre aux sociétés d'être structurées de cette manière.

Il serait inapproprié de retourner à la société l'argent versé sous forme de dividendes parce qu'il faut présumer que les administrateurs ont déclaré des dividendes dans l'intérêt de la société. Ceux-ci devraient par conséquent être redistribués parmi les différentes catégories d'actions qui doivent, en l'absence d'une différenciation valide entre les actions, participer également aux dividendes.

Le versement d'un dividende n'est pas visé par le par. 56(2) de la *Loi de l'impôt sur le revenu* dans la situation

where the dividend payment is within the powers of the corporation and the shareholder is *bona fide* entitled to the dividends. The contribution of a shareholder to the business is irrelevant, however, because a dividend is a return on capital attaching to a share and in no way dependent on the conduct of a particular shareholder.

The four elements of s. 56(2) were met here. The payment in question satisfied the requirement that there be a payment or transfer of property to a person other than the taxpayer; the term "payment" has acquired no technical meaning in the *Income Tax Act* and is to be interpreted in its popular sense. The payment was made pursuant to the direction of the taxpayer or with the concurrence of the taxpayer. An individual in control of a corporation can be said to have directed a payment within the meaning of s. 56(2) by exercising that control. The payment must be for the benefit of the taxpayer or recipient. Here the payment to Mrs. McClurg, which represented Mr. McClurg's dividend entitlement, amounted to a benefit to Mrs. McClurg under s. 56(2). Finally, this amount would have been included in Mr. McClurg's income had the allocation been properly made.

Cases Cited

By Dickson C.J.

Referred to: *Burland v. Earle*, [1902] A.C. 83; *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752; *De Vall v. Wainwright Gas Co.*, [1932] 2 D.L.R. 145; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *The Queen v. Golden*, [1986] 1 S.C.R. 209; *Bronfman Trust v. The Queen*, [1987] 1 S.C.R. 32; *Miller v. M.N.R.*, 62 D.T.C. 1139; *Perrault v. The Queen*, [1979] 1 F.C. 155.

By La Forest J. (dissenting)

Salomon v. Salomon and Co., [1897] A.C. 22; *Farrar v. Farrars, Limited* (1888), 40 Ch. D. 395; *Borland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279; *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592; *Henry v. Great Northern Ry. Co.* (1857), 1 De G. & J. 606, 44 E.R. 858; *Jacobsen v. United Canso Oil & Gas Ltd.* (1980), 113 D.L.R. (3d) 427; *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752; *Rondeau v. Poirier*, [1980] C.A. 35; *Birch v. Cropper, In re Bridgewater Navigation Co.* (1889), 14 A.C. 525; *Champ v. The Queen*, 83 D.T.C. 5029; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Murphy v. The Queen*, 80 D.T.C. 6314; *Bronfman, A. v. M.N.R.*, [1965] C.T.C. 378.

typique où un tel versement relève des pouvoirs de la société et où l'actionnaire a vraiment droit aux dividendes. La contribution d'un actionnaire à l'entreprise n'est cependant pas pertinente, car un dividende est un rapport du capital qui se rattache à une action et ne dépend d'aucune façon de la conduite d'un actionnaire donné.

Les quatre conditions du par. 56(2) sont remplies en l'espèce. Le paiement en question répondait à l'exigence selon laquelle il doit y avoir un paiement ou transfert de biens à une personne autre que le contribuable; le terme «paiement» n'a pas acquis un sens technique dans la *Loi de l'impôt sur le revenu* et il doit être interprété selon son sens ordinaire. Le paiement a été effectué suivant les instructions ou avec l'accord du contribuable. On peut affirmer qu'un particulier ayant le contrôle d'une société a ordonné un paiement au sens du par. 56(2) lorsqu'il exerce ce contrôle. Le paiement doit être effectué au profit du contribuable ou du bénéficiaire. En l'espèce, le versement à Mme McClurg, qui représentait le droit à un dividende de M. McClurg, équivalait à un avantage conféré à Mme McClurg en vertu du par. 56(2). Enfin, ce montant aurait été inclus dans le revenu de M. McClurg si la répartition avait été faite correctement.

Jurisprudence

Citée par le juge en chef Dickson

Arrêts mentionnés: *Burland v. Earle*, [1902] A.C. 83; *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752; *De Vall v. Wainwright Gas Co.*, [1932] 2 D.L.R. 145; *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536; *La Reine c. Golden*, [1986] 1 R.C.S. 209; *Bronfman Trust c. La Reine*, [1987] 1 R.C.S. 32; *Miller v. M.N.R.*, 62 D.T.C. 1139; *Perrault c. La Reine*, [1979] 1 C.F. 155.

Citée par le juge La Forest (dissident)

Salomon v. Salomon and Co., [1897] A.C. 22; *Farrar v. Farrars, Limited* (1888), 40 Ch. D. 395; *Borland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279; *Canadian Aero Service Ltd. c. O'Malley*, [1974] R.C.S. 592; *Henry v. Great Northern Ry. Co.* (1857), 1 De G. & J. 606, 44 E.R. 858; *Jacobsen v. United Canso Oil & Gas Ltd.* (1980), 113 D.L.R. (3d) 427; *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752; *Rondeau c. Poirier*, [1980] C.A. 35; *Birch v. Cropper, In re Bridgewater Navigation Co.* (1889), 14 A.C. 525; *Champ v. The Queen*, 83 D.T.C. 5029; *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536; *Murphy v. The Queen*, 80 D.T.C. 6314; *Bronfman, A. v. M.N.R.*, [1965] C.T.C. 378.

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Canada Business Corporations Act, S.C. 1974-75, c. 33.
Companies Act, R.S.C. 1952, c. 53.
Income Tax Act, S.C. 1970-71-72, c. 63, ss. 56(2), 248(1).

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APPEAL from a judgment of the Federal Court of Appeal, [1988] 2 F.C. 356, 84 N.R. 214, [1988] 1 C.T.C. 75, 88 D.T.C. 6047, affirming a judgment of the Federal Court, Trial Division (1986), 2 F.T.R. 1, 86 D.T.C. 6128, reversing a decision of the Tax Court of Canada, [1984] C.T.C. 2469, 84 D.T.C. 1379, dismissing respondent's appeal from a notice of reassessment. Appeal dismissed (Wilson, La Forest and L'Heureux-Dubé JJ. dissenting).

Ian S. MacGregor and *Brent Paris*, for the appellant.

Robert W. Thompson and *Gordon Balon*, for the respondent.

Lois et règlements cités

Business Corporations Act, R.S.S. 1978, ch. B-10, art. 6(1)*c*)(i), 24(3)*b*), (4), 27, 40, 97(1), 170(1)*c*), 234.
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POURVOI contre un arrêt de la Cour d'appel fédérale, [1988] 2 C.F. 356, 84 N.R. 214, [1988] 1 C.T.C. 75, 88 D.T.C. 6047, qui a confirmé un jugement de la Cour fédérale, Section de première instance (1986), 2 F.T.R. 1, 86 D.T.C. 6128, qui avait infirmé une décision de la Cour canadienne de l'impôt, [1984] C.T.C. 2469, 84 D.T.C. 1379, qui avait rejeté un appel de l'intimé formé contre un avis de nouvelle cotisation. Pourvoi rejeté (les juges Wilson, La Forest et L'Heureux-Dubé sont dissidents).

Ian S. MacGregor et *Brent Paris*, pour l'appelante.

Robert W. Thompson et *Gordon Balon*, pour l'intimé.

The judgment of Dickson C.J. and Sopinka, Gonthier and Cory JJ. was delivered by

DICKSON C.J.—This is an income tax case. The question in the appeal is whether certain dividends received by the wife of the respondent, Jim A. McClurg, in the years 1978, 1979, and 1980 in respect of Class B common shares of Northland Trucks (1978) Ltd. (hereinafter Northland Trucks) should be attributed in part to the respondent, an officer and director of Northland Trucks and the holder of the controlling Class A common shares in the capital stock of that company.

I. Background

1. *Relevant Legislation*

Income Tax Act, S.C. 1970-71-72, c. 63:

56. . . .

(2) A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him.

Business Corporations Act, R.S.S. 1978, c. B-10:

24. . . .

(4) The articles may provide for more than one class of shares and, if they so provide:

(*a*) the rights, privileges, restrictions and conditions attaching to the shares of each class shall be set out therein; and

(*b*) the rights set out in subsection (3) shall be attached to at least one class of shares but all such rights are not required to be attached to one class.

40. A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that:

(*a*) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or

(*b*) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

97.—(1) Subject to any unanimous shareholder agreement, the directors of a corporation shall:

Version française du jugement du juge en chef Dickson et des juges Sopinka, Gonthier et Cory rendu par

LE JUGE EN CHEF DICKSON—Il s'agit en l'espèce d'une affaire d'impôt sur le revenu. Ce pourvoi soulève la question de savoir si certains dividendes reçus par l'épouse de l'intimé, Jim A. McClurg, au cours des années 1978, 1979 et 1980 relativement à des actions ordinaires de catégorie B de Northland Trucks (1978) Ltd. (ci-après Northland Trucks) devraient être attribués en partie à l'intimé, qui est à la fois dirigeant et administrateur de Northland Trucks, et détenteur des actions ordinaires majoritaires de catégorie A du capital-actions de cette société.

I. Historique

1. *Les textes législatifs applicables*

Loi de l'impôt sur le revenu, S.C. 1970-71-72, ch. 63:

56. . . .

(2) Tout paiement ou transfert de biens fait, suivant les instructions et avec l'accord d'un contribuable, à toute autre personne au profit du contribuable ou à titre d'avantage que le contribuable désirait voir accorder à l'autre personne, doit être inclus dans le calcul du revenu du contribuable dans la mesure où il le serait si ce paiement ou ce transfert avait été fait au contribuable.

Business Corporations Act, R.S.S. 1978, ch. B-10:

[TRADUCTION] **24.** . . .

(4) L'acte constitutif peut prévoir plusieurs catégories d'actions, auquel cas:

a) les droits, privilèges, restrictions et conditions qui se rattachent aux actions de chaque catégorie doivent y être énoncés; et

b) chacun des droits énoncés au paragraphe (3) doit se rattacher à au moins une catégorie d'actions sans qu'il soit nécessaire qu'une même catégorie jouisse de l'ensemble de ces droits.

40. La société ne peut déclarer ni verser de dividende s'il existe des motifs raisonnables de croire que:

a) ou bien elle ne peut, ou ne pourrait de ce fait, acquitter son passif à échéance;

b) ou bien la valeur de réalisation de son actif serait, de ce fait, inférieure au total de son passif et de son capital déclaré de toute catégorie.

97.—(1) Sous réserve de toute convention unanime des actionnaires, les administrateurs:

(*a*) exercise the powers of the corporation directly or indirectly through the employees and agents of the corporation; and

(*b*) direct the management of the business and affairs of the corporation.

234.—(1) A complainant may apply to a court for an order under this section.

(2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates:

(*a*) any act or omission of the corporation or any of its affiliates effects a result;

(*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or

(*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner;

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

a) exercent les pouvoirs de la société, directement ou indirectement, par l'intermédiaire de ses employés et mandataires;

b) gèrent les affaires tant commerciales qu'internes de la société.

234.—(1) Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.

(2) Le tribunal, saisi d'une demande visée au paragraphe (1), peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou porte atteinte à leurs intérêts ou n'en tient pas compte:

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses affaires tant commerciales qu'internes ou celles de tout membre de son groupe;

c) soit par la façon dont ses administrateurs ou ceux de son groupe exercent ou ont exercé leurs pouvoirs.

2. *The Facts*

The respondent is President of Northland Trucks, a company incorporated under the Saskatchewan *Business Corporations Act*. The company was established in 1978 upon purchase of an ongoing business, a dealership in International Harvester trucks. The respondent and his partner, Veryle Ellis, are the only directors of the company. The Articles of Incorporation provide for three categories of shares: Class A which are common, voting and participating shares; Class B which are common, non-voting and participating where authorized by the directors; and Class C which are preferred, non-voting shares. The Articles deal with the entitlement to dividends as follows:

Class A Common:

Common, voting and shall be participating shares carrying the distinction and right to receive dividends exclusive of the other classes of shares in the said corporation.

2. *Les faits*

L'intimé est président de Northland Trucks, une société constituée sous le régime de la *Business Corporations Act* de la Saskatchewan. La société a été créée en 1978 par suite de l'achat d'une concession de camions International Harvester. L'intimé et son associé, Veryle Ellis, sont les seuls administrateurs de la société. L'acte constitutif de la société prévoit trois catégories d'actions: la catégorie A, composée d'actions ordinaires avec droit de vote et participantes, la catégorie B, composée d'actions ordinaires sans droit de vote, mais participantes avec l'autorisation des administrateurs, et enfin, la catégorie C, composée d'actions privilégiées sans droit de vote. L'acte constitutif renferme les dispositions suivantes en ce qui concerne le droit aux dividendes:

[TRADUCTION] Actions ordinaires de catégorie A:

Actions ordinaires avec droit de vote et participantes, comportant le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions de ladite société.

Class B Common:

Common, non-voting and shall be participating shares where authorized to be participating shares by unanimous consent of the Directors and the said shares shall carry the distinction and right to receive dividends exclusive of other classes of shares in the said corporation.

Class C Preferred:

Preferred, non-voting shares which carry the distinction and right to receive dividends exclusive of other classes of shares in the said corporation, if the said dividends are authorized by unanimous resolution of the directors.

[And as noted at 84 D.T.C. 1379, at p. 1080]

Each class of shares has the right to receive dividends exclusive of other classes of shares in the company and the company is authorized to issue an unlimited number of shares in each class.

The clause "the distinction and right to receive dividends exclusive of other classes of shares in the said corporation" in the definition of the share classes is crucial to the analysis in this case; a primary question is whether the clause, which gives to the directors unfettered discretion as to the allocation of dividends among classes of shares, constitutes a valid derogation to the common law rule of equality of distribution of dividends. For the sake of simplicity, I will refer to it as the "discretionary dividend clause" throughout these reasons.

Shares in the company were issued at a price of $1.00 each, and the distribution of shares demonstrates the closely held nature of the company:

Name	Class A Common	Class B Common	Class C Preferred
Jim McClurg	400	—	37,500
Veryle Ellis	400	—	37,500
Wilma McClurg (wife of Jim McClurg)	—	100	—
Suzanne Ellis (wife of Veryle Ellis)	—	100	—

In the years 1978, 1979, and 1980, the directors, McClurg and Ellis, voted a declaration and distribution of dividends as follows:

Actions ordinaires de catégorie B:

Actions ordinaires sans droit de vote, mais participantes avec l'autorisation unanime des administrateurs, comportant le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions de ladite société.

Actions privilégiées de catégorie C:

Actions privilégiées sans droit de vote, comportant le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions, pourvu que ces dividendes soient autorisés par résolution unanime des administrateurs.

[Et tel que noté à 84 D.T.C. 1379, à la p. 1380]

Des dividendes peuvent être versés pour chaque catégorie d'actions à l'exclusion des autres catégories d'actions de la société, et la société est autorisée à émettre autant d'actions de chaque catégorie qu'elle le désire.

Dans la définition des catégories d'actions, la clause concernant [TRADUCTION] «le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions» est cruciale pour analyser l'espèce; il faut tout d'abord déterminer si cette clause, qui confère aux administrateurs un pouvoir discrétionnaire illimité en ce qui concerne la répartition des dividendes entre les diverses catégories d'actions, constitue une dérogation valide à la règle de common law ayant trait à l'égalité de la répartition des dividendes. Pour simplifier les choses, j'utiliserai l'expression «clause de dividende discrétionnaire» pour désigner cette clause dans les présents motifs.

Les actions de la société ont été émises au prix de 1 $ l'unité, et leur répartition indique qu'il s'agit d'une société fermée:

Nom	Actions ordinaires de catégorie A	Actions ordinaires de catégorie B	Actions privilégiées de catégorie C
Jim McClurg	400	—	37 500
Veryle Ellis	400	—	37 500
Wilma McClurg (épouse de Jim McClurg)	—	100	—
Suzanne Ellis (épouse de Veryle Ellis)	—	100	—

Au cours des années 1978, 1979 et 1980, les administrateurs McClurg et Ellis ont déclaré des dividendes, répartis de la manière suivante:

Name	1978	1979	1980
Jim McClurg	—	—	—
Veryle Ellis	—	—	—
Wilma McClurg	$10,000	$10,000	$10,000
Suzanne Ellis	$10,000	$10,000	$10,000

Nom	1978	1979	1980
Jim McClurg	—	—	—
Veryle Ellis	—	—	—
Wilma McClurg	10 000 $	10 000 $	10 000 $
Suzanne Ellis	10 000 $	10 000 $	10 000 $

The form of resolution declaring the dividends was as follows:

It was noted and unanimously agreed by all the Directors that Class "B" Shareholders receive dividends in the amount of $100.00 per share for each issued share they hold.

BE IT RESOLVED

that payment of dividends to Class "B" Shareholders are made as follows:

Class "B" Shareholder	Number of issued Shares	Dividend Per Share	Total Paid
Wilma McClurg	100	$100.00	$10,000.00
Suzanne Ellis	100	$100.00	$10,000.00

La résolution déclarant les dividendes était libellée comme suit:

[TRADUCTION] Les administrateurs ont à l'unanimité convenu que les actionnaires de la catégorie «B» recevront des dividendes de 100 $ l'action pour chaque action dont ils sont détenteurs.

IL EST RÉSOLU

que le versement des dividendes aux actionnaires de la catégorie «B» sera effectué de la manière suivante:

Actionnaire de la catégorie B	Nombre d'actions émises	Dividende par action	Total versé
Wilma McClurg	100	100 $	10 000 $
Suzanne Ellis	100	100 $	10 000 $

Although the two directors received no dividends on either their Class A or Class C shares during this three-year period, they did not go unrewarded. They received salaries, were paid bonuses, and bonus entitlements totalling, according to the trial judge, in the case of the respondent, $33,968 in 1978, $65,292 in 1979, and $57,900 in 1980. As well, the company's retained earnings as of October 31, 1980 were $312,611 and as of October 31, 1981 were $421,481. The directors of the company, as owners of the Class A shares (the only shares participating as of right), alone were entitled as of right to share in the accumulated profits of the company.

Bien que les deux administrateurs n'aient touché aucun dividende pour leurs actions de catégorie A ou C au cours de ces trois années, ils n'en ont pas moins reçu des sommes d'argent. En effet, ils ont touché des sommes sous forme de salaires, de primes ou de droits à des primes totalisant pour l'intimé, suivant le juge de première instance, 33 968 $ en 1978, 65 292 $ en 1979 et 57 900 $ en 1980. En outre, les bénéfices non distribués de la société étaient de 312 611 $ au 31 octobre 1980, et de 421 481 $ au 31 octobre 1981. À titre de propriétaires des actions de catégorie A (les seules actions participantes de plein droit), seuls les administrateurs de la société participaient de plein droit aux bénéfices accumulés de la société.

An analysis of the equity of the two classes of shares is shown below:

	Class A Shares	Class B Shares
Shares Issued	800	200
Amount Paid	800	200
Dividends Received	NIL	60,000
Growth Accruing to shares to Oct. 31, 1980	312,611	NIL

Une analyse de l'avoir propre des deux catégories d'actions figure ci-après:

	Actions de catégorie A	Actions de catégorie B
Actions	800	200
Montant versé	800	200
Dividendes reçus	NÉANT	60 000
Croissance des actions pour chaque dollar investi au 31 oct. 1980	312 611	NÉANT

Submissions attached with the Notice of Objection of Mr. McClurg for the 1978, 1979 and 1980 taxation years show that at the end of the 1981 taxation year, the equity (growth) per share stood at $527 per share for Class A common shareholders (an amount of 1.75 times that of Class B shares) whereas the total growth (equity) accruing to Class B common shares still remained at $300 per share.

	Total Reimbursement to Oct. 31/81	Equity Growth Retained to Oct. 31/81	Total	Total $ Per Share Owned	%
Jim McClurg	224,700	210,741	435,441	1,088.62	45
Veryle Ellis	224,700	210,741	435,441	1,088.62	45
Wilma McClurg	48,125	NIL	48,125	481.25	5
Suzanne Ellis	48,125	NIL	48,125	481.25	5
	545,650	421,482	967,132		100

The financing of the formation of the company must also be reviewed. For the respondent's investment of 37,500 preferred shares, he borrowed $37,500 from the Toronto Dominion Bank on a note co-signed by his wife and his father-in-law. The latter provided further security in the form of a term deposit certificate totalling $40,000. The purchase of the business was partly financed by a loan from the vendor, security for which was provided, in part, by the respondent and his wife through the placing of a second mortgage on their jointly owned home in the amount of $25,000. Furthermore, Wilma McClurg co-signed with the respondent a personal guarantee to the International Harvester Company, the supplier of the company, with respect to a $500,000 debenture in connection with the business affairs of Northland Trucks. Finally, the company opened a line of credit with the Toronto Dominion Bank, initially for $50,000, and later increased to $200,000, which was guaranteed by all of the shareholders. It

Les prétentions jointes à l'avis d'opposition présenté par M. McClurg pour les années d'imposition 1978, 1979 et 1980, indiquent qu'à la fin de l'année d'imposition 1981, l'avoir propre (croissance) des actions ordinaires de catégorie A était de 527 $ l'action (ce montant représentant 1,75 fois celui des actions de catégorie B) alors que la croissance totale (avoir propre) des actions ordinaires de catégorie B était encore de 300 $ l'action.

	Remboursement total au 31 oct. 1981	Avoir propre non distribué le 31 oct. 1981	Total	Valeur totale en $ pour chaque action détenue	%
Jim McClurg	224 700	210 741	435 441	1 088,62	45
Veryle Ellis	224 700	210 741	435 441	1 088,62	45
Wilma McClurg	48 125	NÉANT	48 125	481,25	5
Suzanne Ellis	48 125	NÉANT	48 125	481,25	5
	545 650	421 482	967 132		100

Il faut également examiner le financement de l'établissement de la société. La somme de 37 500 $ ayant servi à l'achat de 37 500 actions privilégiées a été empruntée par l'intimé à la Banque Toronto-Dominion, moyennant un billet contresigné par son épouse et son beau-père. Ce dernier a fourni une autre sûreté sous la forme d'un certificat de dépôt à terme de 40 000 $. L'achat de l'entreprise a été financé en partie au moyen d'un prêt consenti par le vendeur, dont caution en partie par l'intimé et son épouse par voie d'une seconde hypothèque s'élevant à 25 000 $ sur la maison dont ils étaient copropriétaires. En outre, Wilma McClurg a également été cosignataire avec l'intimé d'une garantie personnelle en faveur d'International Harvester Company, le fournisseur de la société, relativement à une débenture de 500 000 $ concernant les affaires de Northland Trucks. Enfin, la société a obtenu de la Banque Toronto-Dominion une marge de crédit fixée tout d'abord à 50 000 $ puis, plus tard, à

is worth noting that the trial judge found that Wilma McClurg had personal assets of between $15,000 and $20,000 during this time, which indicates that her personal guarantee was not without significance.

The role of Wilma McClurg in the business during the period in question also warrants examination. The evidence indicates that she carried the title of Administrative Assistant. As such, she assisted in the operation of the business, performing a variety of tasks as the need arose—including stenography, bookkeeping, stocktaking, and driving a truck. For her efforts she received a salary of $625 in 1978, $5,000 in 1979, and $5,000 in 1980. Of the $30,000 received by Wilma McClurg in dividends during this period, $20,000 was reinvested by her in M.E. Investments Corporation, a company with a similar structure to that of Northland Trucks and which involved the same shareholders and directors. The purpose of M.E. Investments Corporation was the acquisition of land upon which the operations of Northland Trucks were located. In acquiring the land, a first mortgage was given. Wilma McClurg was a personal guarantor of the mortgage.

On January 14, 1982, by notices of reassessment, the Minister of National Revenue reassessed the respondent's income for 1978, 1979, and 1980. The basis for the reassessment was that in each of those years $8,000 of the $10,000 in dividends attributed to Wilma McClurg on her Class B shares was properly attributable instead to the respondent pursuant to ss. 56(2) of the *Income Tax Act*. The Minister made this reallocation on the basis of the number of Class A shares owned by the respondent in relation to the number of Class B shares owned by Wilma McClurg. The position of the Minister is that the dividends declared in each of the years in question should be attributed equally to all of the common shares, no matter of what class and notwithstanding the express condition attaching to the Class B shares

200 000 $ et qui était garantie par tous les actionnaires. Il convient de souligner que le juge de première instance a conclu que la valeur de l'actif personnel de Wilma McClurg était à l'époque de 15 000 $ à 20 000 $, ce qui indique que la garantie personnelle qu'elle avait donnée n'était pas sans importance.

Il convient également d'examiner le rôle joué par Wilma McClurg dans l'entreprise au cours de cette même période. La preuve indique qu'elle occupait le poste d'adjointe administrative et, qu'en cette qualité, elle participait à l'exploitation de l'entreprise en exécutant diverses tâches, suivant les besoins—notamment elle faisait fonction de sténographe, s'occupait de la tenue de livres et de l'inventaire des marchandises, et elle conduisait un camion. Pour ses efforts, elle a touché un salaire de 625 $ en 1978, de 5 000 $ en 1979 et de 5 000 $ en 1980. Des 30 000 $ qu'elle a reçus sous forme de dividendes au cours de cette période, Wilma McClurg a réinvesti 20 000 $ dans M.E. Investments Corporation, une compagnie dont la structure était analogue à celle de Northland Trucks et qui comptait les mêmes actionnaires et administrateurs. M.E. Investments Corporation a été constituée dans le but d'acquérir un terrain où se trouvait l'entreprise de Northland Trucks. Ce terrain a été acquis grâce à une première hypothèque que Wilma McClurg a garantie personnellement.

Le 14 janvier 1982, le ministre du Revenu national a délivré des avis de nouvelle cotisation relativement aux revenus du demandeur pour les années 1978, 1979 et 1980. Il y soutenait que, pour chacune de ces années, des 10 000 $ attribués à Wilma McClurg à titre de dividendes provenant de ses actions de catégorie B, 8 000 $ auraient plutôt dû être attribués à l'intimé conformément au par. 56(2) de la *Loi de l'impôt sur le revenu*. Le Ministre a effectué cette nouvelle ventilation en fonction du nombre d'actions de catégorie A que détenait l'intimé, par rapport au nombre d'actions de catégorie B que détenait Wilma McClurg. Le Ministre prétend que les dividendes déclarés au cours de chacune de ces années devraient être répartis également entre les actions ordinaires, quelle que soit leur catégorie et malgré la condi-

that they shall carry the right to receive dividends exclusive of other classes of shares in the company. The respondent's appeal to the Tax Court of Canada was dismissed. The respondent further appealed from the decision of the Tax Court judge by way of an action commenced in the Federal Court of Canada, Trial Division. The appeal was allowed. The Minister's appeal to the Federal Court of Appeal was dismissed. Finally, leave to appeal was granted by this Court.

3. *Judgments Below*

Tax Court of Canada, 84 D.T.C. 1379

Goetz T.C.J. found no evidence suggesting that the investment of Wilma McClurg in the company was of any importance. He reasoned that the respondent and his partner had full control of the company and he concluded, at p. 1381, that the share structure was solely an income-splitting device:

> To my way of thinking the share set up and the establishment of the Class "B" shares was a channel of Northland to funnel payments of profits to the Appellant's wife and this was to the Appellant's tax benefit and is prohibited by section 56(2).

Goetz T.C.J. concluded, at p. 1381, that the dividends were a "blatant effort" at conferring a benefit on the wives of the directors and he further remarked, at p. 1382, that "the wives were the puppets of the Appellant and Ellis and did as they were told". Finally, he determined that the efforts expended by Wilma McClurg and her exposure under the guarantees had no relevance to the payment of dividends. He dismissed the appeal from the reassessment.

Federal Court of Canada—Trial Division (1986), 2 F.T.R. 1

Strayer J. began by considering the interpretation of s. 56(2), and he found, at p. 4, that its literal meaning could require that "every dividend

tion expresse rattachée aux actions de catégorie B, qui prévoit qu'elles comportent le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions de ladite société. L'appel interjeté par l'intimé à la Cour canadienne de l'impôt a été rejeté. L'intimé a ensuite interjeté appel de la décision du juge de la Cour de l'impôt devant la Section de première instance de la Cour fédérale du Canada. Cet appel a été accueilli. L'appel interjeté par le Ministre devant la Cour d'appel fédérale a été rejeté. Finalement, la demande d'autorisation de pourvoi devant notre Cour a été accueillie.

3. *Les jugements des tribunaux d'instance inférieure*

Cour canadienne de l'impôt, 84 D.T.C. 1379

Le juge Goetz a conclu qu'aucun élément de preuve n'indiquait que le placement fait par Wilma McClurg dans la société revêtait une quelconque importance. Il a déduit que l'intimé et son associé avaient le contrôle complet de la société, et il a conclu, à la p. 1381, que la structure du capital-actions constituait simplement un moyen de partager les revenus:

> À mon sens, la structure du capital-actions et l'établissement des actions de catégorie «B» étaient un moyen pour Northland de verser des profits à la femme de l'appelant, ce qui constituait un avantage fiscal pour l'appelant et est interdit par le paragraphe 56(2).

Le juge Goetz a conclu, à la p. 1381, que les dividendes constituaient un «effort manifeste» de conférer un avantage aux épouses des administrateurs, et il a en outre fait remarquer, à la p. 1382, que «la femme de l'appelant et celle d'Ellis étaient des jouets entre leurs mains et elles faisaient ce que ceux-ci leur disaient de faire». Il a finalement statué que les efforts déployés par Wilma McClurg et les risques qu'elle avait pris en vertu des garanties n'avaient rien à voir avec le versement de dividendes. Il a rejeté l'appel interjeté contre la nouvelle cotisation.

Cour fédérale du Canada—Section de première instance (1986), 2 F.T.R. 1

Le juge Strayer a tout d'abord examiné comment il faut interpréter le par. 56(2), et il a conclu, à la p. 4, qu'au sens littéral il pourrait exiger que

paid to any shareholder of a company could be attributed to the income of directors participating in a decision to pay the dividend". He continued:

> Such a dividend would be a "payment" "to some other person" with the "concurrence" of the director. It could also be described as a "benefit" that the director "desired to have conferred" on the shareholder, it surely being desirable from the viewpoint of directors that, where ever possible, dividends be paid to the shareholders of the company in order to enhance their satisfaction with the company.

Strayer J., reasoned, however, that the intention of the legislature could not have been such a broad reading and found the subsection qualified in that, to fall foul of s. 56(2), the taxpayer must seek to avoid receipt of funds that would otherwise be payable to him and that the concept of payment of a "benefit" is to be contrasted with payments for consideration.

In the opinion of Strayer J., it could not be said that money payable to the respondent was diverted to his wife so as to bring the situation within s. 56(2). He was not persuaded that the Articles of Incorporation must be regarded as void in so far as they permit differential payment of dividends to various classes of shareholders. Nor did he see any legal impediment to a contract between the shareholder and the company which allows the directors of the company to fix the amount of dividends payable in a given year to a given class of shareholders. Since no dividends were payable as a matter of right to holders of Class A shares, such as the respondent, without a resolution to that effect being adopted by the directors, it could not be said that money payable to him was diverted to his wife so as to bring the situation within s. 56(2).

Strayer J. also was satisfied that the dividends paid to Wilma McClurg were not a "benefit" within the contemplation of s. 56(2). The dividends were paid within the context of a legal

«chaque dividende versé à un actionnaire de la société soit attribué au revenu des administrateurs qui ont pris part à la décision de verser le dividende». Il a ajouté:

> En effet, le dividende deviendrait un «paiement [. . .] fait [. . .] à toute autre personne», «avec l'accord» d'un administrateur. Il pourrait également être considéré comme un «avantage» que l'administrateur «désirait voir accorder» à l'actionnaire, compte tenu du fait qu'il est certainement souhaitable, du point de vue des administrateurs, qu'un dividende soit déclaré lorsque cela est possible, afin d'augmenter le sentiment de satisfaction qu'éprouvent les actionnaires à l'égard de la société.

Le juge Strayer a toutefois conclu que le législateur ne pouvait avoir eu l'intention de donner un sens aussi large à cette disposition; il a également conclu que le par. 56(2) devait faire l'objet de réserves en ce que pour y contrevenir, le contribuable doit chercher à éviter de toucher des sommes qui lui seraient autrement payables, et qu'il faut établir une distinction entre le concept de versement d'un «avantage» et le paiement fait moyennant contrepartie.

De l'avis du juge Strayer, il était impossible d'affirmer que les sommes payables à l'intimé ont été détournées en faveur de son épouse, de manière à déclencher l'application du par. 56(2). Il n'était pas convaincu que l'acte constitutif de la société doit être considéré comme nul dans la mesure où il permet des disparités dans le versement des dividendes aux diverses catégories d'actionnaires. Il ne voyait non plus aucun obstacle légal à ce qu'un contrat conclu entre l'actionnaire et la société permette aux administrateurs de fixer le montant de dividendes payable au cours d'une année particulière à une certaine catégorie d'actionnaires. Comme aucun dividende n'était payable de plein droit aux détenteurs des actions de catégorie A, comme l'intimé, sans une résolution des administrateurs en ce sens, on ne pouvait pas dire que des sommes payables à l'intimé ont été détournées en faveur de son épouse, de manière à déclencher l'application du par. 56(2).

Le juge Strayer était également convaincu que les dividendes versés à Wilma McClurg n'étaient pas un «avantage» au sens du par. 56(2). Ces dividendes ont été versés dans le contexte de rap-

relationship between the shareholder and the company pursuant to which she was entitled to receive dividends as declared from time to time by the directors. The surrounding circumstances suggested to him, at p. 5, that "this was a legitimate business relationship created by all the necessary legal instruments and should not be treated as a sham". Wilma McClurg had made a real contribution to the establishment of the business through her personal guarantee and the share of the mortgage she assumed on the house she owned jointly with the respondent. Furthermore, she had taken an active part in the operation of the business for which she was paid only a small salary. The appeal was allowed.

ports juridiques entre l'actionnaire et la société, en vertu desquels l'actionnaire avait le droit de recevoir les dividendes déclarés à l'occasion par les administrateurs. Les circonstances de l'espèce ont porté le juge à croire, à la p. 5, «qu'il s'agissait d'une relation d'affaires légitime appuyée par tous les documents légaux nécessaires, et qui ne devrait pas être considérée comme du trompe-l'œil». Wilma McClurg a fourni un apport très réel à la mise sur pied de l'entreprise, au moyen de la garantie personnelle qu'elle a donnée et de la part de l'hypothèque qu'elle a assumée sur la maison qu'elle possédait conjointement avec l'intimé. En outre, elle a joué un rôle actif dans l'exploitation de l'entreprise, en échange duquel elle n'a touché qu'un maigre salaire. L'appel a été accueilli.

Federal Court of Appeal, [1988] 2 F.C. 356

The majority judgment at the Federal Court of Appeal was delivered by Urie J. and was concurred in by Heald J. Urie J. began by expressing a difficulty in appreciating how s. 56(2) could apply in a corporate context. A corporation provides to its shareholders, by way of dividends, such portion of its earnings as its directors deem advisable. Those directors do so in their capacities as directors and not in their personal capacities, no matter how closely held the corporation's shares. Urie J. had further difficulty understanding how "a taxpayer," when acting as a director, satisfies any of the conditions precedent for the application of s. 56(2). He reasoned, at p. 363, that:

> Only the most explicit language, which is not present in subsection 56(2), would justify the notion that a director acting as such could be seen as directing a corporation to divert a transfer or payment for his own benefit or the benefit of another person, absent bad faith, breach of fiduciary duty or acting beyond the powers conferred by the share structure of the corporation, none of which bases have been alleged here.

Furthermore, Urie J. felt that applying s. 56(2) in a corporate context would make no distinction between arm's length and non-arm's length trans-

Cour d'appel fédérale, [1988] 2 C.F. 356

L'arrêt majoritaire de la Cour d'appel fédérale, auquel a souscrit le juge Heald, a été rendu par le juge Urie. Celui-ci a tout d'abord indiqué qu'il avait peine à concevoir comment le par. 56(2) pouvait s'appliquer à une société. La société verse sous forme de dividendes à ses actionnaires la part de ses bénéfices que ses administrateurs estiment indiquée. Ces administrateurs agissent alors en leur qualité d'administrateurs et non à titre personnel, peu importe que les actions puissent être détenues par un grand ou un petit nombre d'actionnaires. Le juge Urie pouvait en outre difficilement comprendre comment on peut affirmer qu'«un contribuable», lorsqu'il agit en qualité d'administrateur, peut remplir l'une ou l'autre des conditions essentielles à l'application du par. 56(2). Il a tenu le raisonnement suivant, à la p. 363:

> Seuls les termes les plus explicites, que l'on ne retrouve pas au paragraphe 56(2), justifieraient la notion qu'un administrateur qui agirait en cette qualité pourrait être considéré comme ordonnant à la société de détourner un paiement ou un transfert de biens à son profit ou au profit d'une autre personne, en l'absence de mauvaise foi, d'un abus de confiance ou d'un excès des pouvoirs conférés par l'organisation du capital social de la société, et rien de cela n'a été allégué en l'espèce.

De plus, le juge Urie a estimé que l'application du par. 56(2) à une société ne ferait aucune distinction entre des transferts effectués avec ou sans

actions, leaving all directors at risk of having dividends declared by them, and paid to shareholders who may be relatives, attributed to them for tax purposes. He concluded that the section was not intended to apply to the directors of corporations participating in the declaration of corporate dividends. He dismissed the appeal.

Desjardins J. dissented at the Court of Appeal. She began by observing that, unless otherwise provided in the Articles of Incorporation or by statute, the rights of the classes of shareholders to receive dividends are to be assessed on a basis of equality. She disagreed with Strayer J.'s conclusion that the description of the dividends found in the Articles of Incorporation constituted a "derogation from the principle of equality amongst shareholders recognized in the common law" (at p. 368), stating at p. 369:

> What happens in the case at bar is that shareholders in each class are given "the distinction and right to receive dividends to the exclusion of other classes". From that perspective, they are all equal. Moreover, no mathematical formula is given if a distribution were to occur. . . . The directors obtain full control over the allocation if they declare dividends . . . .
>
> I doubt that such a discretion to be exercised by way of a resolution of the directors, can be equated with a derogation specific and substantive enough to discard the common law rule of equality of distribution since there is no rule by which the directors are to carry out their discretion.

The moneys paid, in her opinion, ought to have been distributed equally amongst the shareholders and there should have been included in the respondent's income part of the dividends paid to his wife.

In rejecting the trial judge's conclusion that there was a legitimate business relationship between the respondent's wife and the company, Desjardins J. remarked that there is no relationship between the services that a shareholder brings to a company and his or her entitlement to a dividend. The dividends come as a return on

lien de dépendance et ainsi, tous les administrateurs de société, qui pourraient compter des parents parmi les actionnaires, risqueraient de se voir attribuer à des fins d'impôt sur le revenu les dividendes qu'ils auraient déclarés et versés auxdits actionnaires. Il a conclu que le paragraphe en cause n'avait pas été conçu pour s'appliquer aux administrateurs ayant contribué à déclarer les dividendes de sociétés. Il a rejeté l'appel.

Le juge Desjardins de la Cour d'appel était dissidente. Elle a d'abord fait remarquer que, sous réserve de mention contraire dans l'acte constitutif de la société ou dans la loi, les droits aux dividendes de toutes les catégories d'actionnaires doivent s'apprécier à égalité. Elle n'était pas d'accord avec la conclusion du juge Strayer (à la p. 368), selon laquelle les mentions relatives aux dividendes dans l'acte constitutif représentaient une «dérogation au principe de l'égalité entre les actionnaires, reconnu en *common law*» affirmant, à la p. 369:

> Ce qui se passe en l'espèce, c'est que les actionnaires de chaque catégorie ont «le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions». Selon cette perspective, ils sont tous égaux. De plus, aucune formule mathématique n'est prévue pour un éventuel partage . . . Les administrateurs ont pleins pouvoirs sur la répartition des dividendes qu'ils déclarent, le cas échéant . . .
>
> Je doute qu'un tel pouvoir discrétionnaire qui s'exerce par le biais d'une résolution des administrateurs puisse être assimilé à une dérogation suffisamment précise et importante pour écarter la règle de *common law* ayant trait à l'égalité de la répartition des dividendes puisqu'aucune règle ne régit l'exercice du pouvoir discrétionnaire des administrateurs.

À son avis, les sommes versées en l'espèce auraient dû être réparties également entre tous les actionnaires, et une partie des dividendes versés à l'épouse de l'intimé aurait dû être incluse dans le revenu de l'intimé.

Rejetant la conclusion du juge de première instance suivant laquelle il existait entre l'épouse de l'intimé et la société une relation d'affaires légitime, le juge Desjardins a fait remarquer qu'il n'existe aucun rapport entre les services rendus par un actionnaire pour la société et son droit à un dividende. Les dividendes représentent le rende-

investment and attach to the share, rather than to the shareholder.

Desjardins J. was not persuaded that s. 56(2), if interpreted widely, would cover every declaration of dividends. Once declared, the amount of the dividend received on each share is governed by a mathematical formula which the director must apply in accordance with the contract between the shareholders and the company.

II. Analysis

This appeal raises issues relating both to corporate law and the law of income taxation. In my view, it is useful to deal with the former first as the analysis is beneficial in the determination of the application of s. 56(2) of the *Income Tax Act*.

1. *Corporate Law Issues*

I begin the analysis with a statement of the obvious. The decision to declare a dividend lies within the discretion of the directors of a company, subject to any restrictions which have been included in the Articles of Incorporation. This principle has long been accepted at common law and was explicitly recognized by Lord Davey, speaking for the Judicial Committee of the Privy Council, in *Burland v. Earle*, [1902] A.C. 83, at p. 95, wherein the principle was described in terms of the "internal management" of the company:

> Their Lordships are not aware of any principle which compels a joint stock company while a going concern to divide the whole of its profits amongst its shareholders. Whether the whole or any part should be divided, or what portion should be divided and what portion retained, are entirely questions of internal management which the shareholders must decide for themselves, and the Court has no jurisdiction to control or review their decision, or to say what is a "fair" or "reasonable" sum to retain undivided, or what reserve fund may be "properly" required.

With the advent of statutory regulation of corporations, the authority to pay dividends, recognized at common law as part of the internal management of the company, has been given statutory

ment d'un placement, et ils se rattachent à l'action et non à l'actionnaire.

Le juge Desjardins n'était pas convaincue que le par. 56(2), s'il devait être interprété de façon large, s'appliquerait à toutes les déclarations de dividendes. Une fois le dividende déclaré, le montant attribué à chaque action est régi par une formule mathématique que l'administrateur doit appliquer conformément au contrat conclu entre les actionnaires et la société.

II. Analyse

Ce pourvoi soulève des questions concernant à la fois le droit des sociétés et le droit fiscal. À mon avis, il convient d'examiner tout d'abord les premières, leur analyse étant utile pour déterminer s'il y a lieu d'appliquer le par. 56(2) de la *Loi de l'impôt sur le revenu*.

1. *Les questions relatives au droit des sociétés*

Commençons cette analyse par un simple truisme. La décision de déclarer un dividende est laissée à la discrétion des administrateurs d'une société, sous réserve des restrictions prévues par l'acte constitutif de la société. Ce principe est depuis longtemps accepté en common law et son existence a été expressément reconnue par lord Davey qui a exprimé l'opinion du Comité judiciaire du Conseil privé dans l'affaire *Burland v. Earle*, [1902] A.C. 83, à la p. 95; ce principe y est décrit en fonction de la «gestion interne» de la société:

> [TRADUCTION] Leurs Seigneuries ne connaissent aucun principe qui oblige une société par actions prospère à diviser l'ensemble de ses profits entre ses actionnaires. La décision de partager la totalité ou une partie des profits, ou la détermination des profits qui devraient être partagés et de ceux qui ne devraient pas être distribués sont des questions de pure gestion interne que doivent trancher les actionnaires; la Cour n'a pas compétence pour contrôler ou réviser leur décision ni pour déterminer quelle somme «juste» ou «raisonnable» ne devrait pas être partagée, ou quel montant peut «à juste titre» être requis comme fonds de réserve.

Avec l'avènement de la réglementation législative des sociétés, le pouvoir de verser des dividendes qui, suivant la common law, relève de la gestion interne de la société a été légalement

recognition. In the case at bar, the governing legislation is the Saskatchewan *Business Corporations Act* (hereinafter *S.B.C.A.*). In my view, it cannot be disputed that the power to pay dividends is an integral component of the broad grant of managerial power for directors found in s. 97(1) of the Act, cited earlier. I take it, both from an observation of the workings of corporations, and from other provisions in the statute, that the section embraces the common law power of directors. The power to declare dividends is expressly limited in the Act, in much the same way as it was at common law. For example, s. 40 of the *S.B.C.A.*, also cited earlier, prohibits the declaration of a dividend if there exist reasonable grounds to believe that to do so would leave the corporation unable to pay its debts (s. 40(*a*)); or, if the payment of a dividend would render the realizable value of the assets of the corporation less than the aggregate of its liabilities and stated capital of all classes of shares (s. 40(*b*)). Although these restrictions are not brought into play by the declarations of dividends in issue in this appeal, the presence of those limitations in the Act suggests that the power to declare dividends is statutorily limited only by restrictions expressly stated.

Of course, the power to declare dividends is further qualified by the fact that the law has for many years recognized that the general managerial power which rests in the directors of a company is fiduciary in nature. The declaration of dividends, which is subsumed within that power, therefore is limited legally in that it must be exercised in good faith and in the best interests of the company. As Professor Welling recognized in his treatise *Corporate Law in Canada* (1984), at p. 614, this limitation exists when any disbursement is made by the directors of a company:

> The directors' general managerial power is a fiduciary one, owed to the corporation. It must always be exercised in what the directors' from time to time think is likely to serve the best interests of the corporation. It has been consistently urged throughout this book that "the corporation", as referred to in that context, means the legal and economic entity, not some vague aggregation

reconnu. En l'espèce, la loi applicable est la *Business Corporations Act* de la Saskatchewan (ci-après la *S.B.C.A.*). Il est incontestable, à mon avis, que le pouvoir de verser des dividendes fait partie intégrante du pouvoir général de gestion conféré aux administrateurs par le par. 97(1) de la Loi, cité plus haut. Je présume, en me fondant à la fois sur un examen du fonctionnement des sociétés et sur d'autres dispositions de la Loi, que cette disposition englobe le pouvoir reconnu aux administrateurs par la common law. La Loi impose expressément des restrictions au pouvoir de déclarer des dividendes, un peu comme c'était le cas en common law. Par exemple, l'art. 40 de la *S.B.C.A.*, également cité plus haut, interdit de déclarer un dividende s'il existe des motifs raisonnables de croire que, si elle le faisait, la société serait incapable d'acquitter son passif (al. 40*a*)), ou que si, par suite du versement d'un dividende, la valeur de réalisation de l'actif de la société serait inférieure au total de son passif et de son capital déclaré (al. 40*b*)). Bien que les déclarations de dividendes dont il est question en l'espèce n'entraînent pas l'application de ces restrictions, la présence de ces dernières dans la Loi semble indiquer que le pouvoir de déclarer des dividendes ne peut être légalement limité que par des restrictions expresses.

Évidemment, le pouvoir de déclarer des dividendes est davantage limité par le fait que la loi reconnaît depuis de nombreuses années que le pouvoir général de gestion conféré aux administrateurs d'une société est de nature fiduciaire. La déclaration de dividendes, qu'englobe ce pouvoir, est par conséquent légalement limitée du fait qu'elle ne peut être effectuée que de bonne foi et au mieux des intérêts de la société. Comme l'a reconnu le professeur Welling dans son traité intitulé *Corporate Law in Canada* (1984), à la p. 614, cette limite s'applique chaque fois que les administrateurs d'une société effectuent une sortie de fonds:

> [TRADUCTION] Le pouvoir général de gestion des administrateurs est un pouvoir fiduciaire qu'ils possèdent en raison de l'existence de la société. Les administrateurs doivent l'exercer de la manière qui, selon eux, permet le mieux de servir les intérêts de la société. Tout au long du présent ouvrage, nous avons insisté sur le fait que «la société», dans ce contexte, désigne l'entité juridique et

of the shareholders' wants. This means that dividends should be seen as basically what they seem to be on a narrow, legalistic view: corporate gifts . . . . giving it is permissible only to the extent that the directors think that it will serve the corporate entity's best interest, as they then perceive those interests; beyond this, the declaration of any dividend, like any other unauthorized gift of corporate property, is a breach of directors' duty.

In my opinion, this is an accurate statement of the legal basis of the declaration of a dividend in the context of the modern corporation.

Having reviewed the legal basis for the payment of a dividend by a company, another fundamental principle of corporate law can be restated. The appellant, the Minister of National Revenue, argues, and it is conceded by the respondent, that the rights carried by all shares to receive a dividend declared by a company are equal unless otherwise provided in the Articles of Incorporation. This principle, like the managerial power to declare dividends, has been well accepted at common law. The principle, or more accurately, the presumption of equality amongst shares and the prerequisites required to rebut that presumption, are described in Schmitthoff, *Palmer's Company Law*, 23rd ed., vol. I, at p. 387, para. 33-06:

> Prima facie the rights carried by the shares rank *pari passu*, *i.e.* the shareholders participate in the benefits of membership equally. It is only when a company divides its share capital into different classes with different rights attached to them that the prima facie presumption of equality of shares may be displaced.

In my view, a precondition to the derogation from the presumption of equality, both with respect to entitlement to dividends and other shareholder entitlements, is the division of shares into different "classes". The rationale for this rule can be traced to the principle that shareholder rights attach to the shares themselves and not to shareholders. The division of shares into separate classes, then, is the means by which shares (as opposed to sharehold-

économique et non quelque assemblage imprécis des aspirations des actionnaires. Cela signifie qu'il faut considérer les dividendes pour ce qu'ils semblent être d'un point de vue étroit et légaliste: des dons de la société. [. . .] étant donné que cela n'est permis que dans la mesure où les administrateurs estiment que cela servira au mieux les intérêts de la société, tels qu'ils les perçoivent alors; dans les autres cas, la déclaration d'un dividende, comme tout autre don non autorisé d'un bien de la société, constitue une violation de l'obligation des administrateurs.

À mon avis, ce passage énonce clairement le fondement juridique de la déclaration d'un dividende dans le contexte des sociétés modernes.

Après avoir examiné les principes juridiques sur lesquels repose le versement d'un dividende par une société, il est possible de rappeler un autre principe fondamental du droit des sociétés. L'appelant, le ministre du Revenu national, soutient, ce qu'admet l'intimé, que les droits que comportent toutes les actions de recevoir un dividende déclaré par une société sont égaux à moins que l'acte constitutif ne prévoie le contraire. Ce principe, tout comme le pouvoir des administrateurs de déclarer des dividendes, est bien reconnu en common law. Le principe, ou plus précisément, la présomption d'égalité entre les actions ainsi que les conditions préalables nécessaires pour réfuter cette présomption sont décrits dans Schmitthoff, *Palmer's Company Law*, 23e éd., vol. I, à la p. 387, par. 33-06:

> [TRADUCTION] À première vue, les droits que comportent les actions sont de même rang, c.-à-d. que les actionnaires participent également aux bénéfices découlant de leur appartenance à la société. Ce n'est que lorsque la compagnie divise son capital-actions en différentes catégories assorties de droits différents qu'il peut y avoir déplacement de la présomption *prima facie* d'égalité des actions.

À mon avis, la division des actions en différentes «catégories» constitue une condition nécessaire pour pouvoir déroger à la présomption d'égalité, à la fois en ce qui concerne le droit aux dividendes et les autres droits des actionnaires. Cette règle trouve sa raison d'être dans le principe voulant que les droits des actionnaires se rattachent aux actions elles-mêmes et non aux actionnaires. Ainsi, la division des actions en différentes catégories

ers) are distinguished, and in turn allows for the derogation from the presumption of equality: *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752 (C.A.), at p. 754 (*per* Houlden J.A.).

The concept of share "classes" is not technical in nature, but rather is simply the accepted means by which differential treatment of shares is recognized in the Articles of Incorporation of a company. As Professor Welling, *supra*, succinctly explains, at p. 583, "a class is simply a sub-group of shares with rights and conditions in common which distinguish them from other shares". Indeed, the use of the share class is recognized in the *S.B.C.A.* as the means by which derogation from the principle of equality is to be achieved. The statute thus explicitly requires that "the rights, privileges, restrictions and conditions attaching to the shares of each class" must be expressly stated in the Articles of Incorporation: s. 24(4)(*a*).

Having outlined the underlying principles of corporate law relevant to the issues raised on this appeal, the application of those principles to the facts can be attempted. The appellant argues that the discretionary dividend clause in the Articles of Incorporation of Northland Trucks does not create discrete classes of shares with different rights to dividends. Furthermore, the Minister contends that the clause creates no right to dividends at all and, therefore, does not comply with the statutory requirement in s. 24(4)(*a*). Consequently, the allocation of a dividend made pursuant to the discretionary dividend clause must be disregarded because of its failure to comply with the *S.B.C.A.* and with the principles of corporate and common law. As a result, the presumption of equality has not been rebutted and equality of distribution amongst the share classes prevails. As I have earlier noted, Desjardins J. in her dissenting reasons at the Court of Appeal accepted this argument, and held that the clause permits the directors to create differences in dividend allocation "at whim". She thus expressed doubts, at p. 369, as to whether:

permet d'établir une distinction entre les actions (par opposition aux actionnaires) et ensuite, de déroger à la présomption d'égalité: *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752 (C.A.), à la p. 754 (le juge Houlden).

Le concept des «catégories» d'actions n'a pas un caractère formaliste; il s'agit plutôt simplement du moyen accepté par lequel on reconnaît dans l'acte constitutif d'une société des disparités dans le traitement des actions. Comme l'explique brièvement le professeur Welling, précité, à la p. 583 [TRADUCTION] «une catégorie est tout simplement un sous-groupe d'actions comportant des conditions et des droits communs qui les distinguent des autres actions». En fait, la *S.B.C.A.* reconnaît que l'utilisation de catégories d'actions constitue le moyen de déroger au principe de l'égalité. Ainsi, elle exige expressément que [TRADUCTION] «les droits, privilèges, restrictions et conditions qui se rattachent aux actions de chaque catégorie» soient énoncés expressément dans l'acte constitutif: al. 24(4)*a*).

Après avoir exposé les principes sous-jacents du droit des sociétés pertinents aux questions soulevées dans le présent pourvoi, on peut maintenant tenter d'appliquer ces principes aux faits. L'appelant soutient que la clause de dividende discrétionnaire figurant dans l'acte constitutif de Northland Trucks ne crée pas de catégories d'actions distinctes, assorties de droits différents quant aux dividendes. Le Ministre allègue en outre que cette clause ne crée aucun droit aux dividendes et que, par conséquent, elle ne satisfait pas à l'exigence de l'al. 24(4)*a*). En conséquence, il ne faut pas tenir compte de la répartition de dividendes faite conformément à la clause de dividende discrétionnaire parce qu'elle ne respecte pas la *S.B.C.A.* ni les principes du droit des sociétés et de la common law. La présomption d'égalité n'ayant pas été réfutée, il doit y avoir répartition égale entre les catégories d'actions. Comme je l'ai déjà souligné, le juge Desjardins de la Cour d'appel a accepté cet argument dans ses motifs de dissidence et elle a statué que la clause permet aux administrateurs de créer des distinctions «selon leur fantaisie» en ce qui concerne la répartition des dividendes. Elle a ensuite affirmé, à la p. 369, qu'elle doutait:

... such a discretion to be exercised by way of a resolution of the directors, can be equated with a derogation specific and substantive enough to discard the common law rule of equality of distribution since there is no rule by which the directors are to carry out their discretion.

... qu'un tel pouvoir discrétionnaire qui s'exerce par le biais d'une résolution des administrateurs puisse être assimilé à une dérogation suffisamment précise et importante pour écarter la règle de *common law* ayant trait à l'égalité de la répartition des dividendes puisqu'aucune règle ne régit l'exercice du pouvoir discrétionnaire des administrateurs.

The respondent argues, on the other hand, that the discretionary dividend clause is a valid exercise of contractual rights between the company and its shareholders in accordance with the common law and statute. Moreover, the right to receive dividends in potentially unique amounts gives each share class different rights. It is argued that this is a material distinction sufficient to create separate share classes with differentiated dividend entitlements which, in turn, validly derogates from the principle of equality.

L'intimé prétend pour sa part que la clause de dividende discrétionnaire constitue un exercice valide des droits contractuels liant la société et ses actionnaires, conformément à la common law et à la Loi. En outre, le droit de recevoir des dividendes d'un montant possiblement unique confère des droits différents à chaque catégorie d'actions. Il allègue qu'il s'agit d'une distinction importante, suffisante pour créer des catégories distinctes d'actions assorties de droits différents aux dividendes, ce qui constitue une dérogation valide au principe de l'égalité.

I agree with the arguments which the respondent has raised in this regard. In my opinion, the discretionary dividend clause is both a valid means of allocating declared dividends and is sufficient to rebut the presumption of equality amongst shares. I find this determination, with respect to the presumption of equality, to be a simple factual inquiry. In my view, the presence of a discretionary dividend clause can only be interpreted as creating differences between share classes, since that is the rationale for the clause. As far as the statutory requirements are concerned, the purpose of s. 24(4)(*a*) is to ensure that shareholders are fully aware of their entitlements and privileges to the extent that the presumption of equality is rendered inapplicable. To my mind, that purpose has been met since the dividend entitlements are clearly set out in the description of the share classes. In this regard, I find the argument of Quessy in his article "Les aspects corporatifs et fiscaux des actions à dividende discrétionnaire", [1985] 7 *R.P.F.S.* 31, at p. 45, to be persuasive:

Je souscris aux arguments soulevés par l'intimé à cet égard. À mon avis, la clause de dividende discrétionnaire constitue à la fois un moyen légitime de répartir les dividendes déclarés et suffit à réfuter la présomption d'égalité des actions. J'estime que cette conclusion relative à la présomption d'égalité résulte d'un simple examen des faits. À mon avis, la seule interprétation possible de la présence d'une clause de dividende discrétionnaire est qu'elle crée des distinctions entre les catégories d'actions, puisqu'il s'agit de la raison même de son existence. Pour ce qui est des exigences prévues dans la Loi, l'al. 24(4)*a*) a pour objet d'assurer que les actionnaires connaissent pleinement leurs droits et privilèges de manière à rendre inapplicable la présomption d'égalité. Selon moi, cet objectif est atteint puisque les droits aux dividendes sont clairement énoncés dans la description des catégories d'actions. À cet égard, j'estime convaincants les propos de Quessy dans son article intitulé «Les aspects corporatifs et fiscaux des actions à dividende discrétionnaire», [1985] 7 *R.P.F.S.* 31, à la p. 45:

[TRANSLATION] ... the inclusion in the articles of a discretionary dividend clause expressly establishes that the corporation intends to derogate from the principle of equality among shareholders. The provision included in the articles alters the division of profits, which in the absence of such a provision would have to be made in

... l'inclusion dans les statuts d'une clause de dividende discrétionnaire établit expressément que la corporation entend déroger au principe de l'égalité entre actionnaires. La disposition incluse aux statuts modifie le partage des profits qui devrait, en l'absence d'une telle disposi-

accordance with the principle of equality among shareholders.

I am in full agreement with Strayer J. (at p. 5) that, with respect to the presumption of equality, "the Articles of Incorporation specifically provide to the contrary". In my view, then, the presumption of equality manifestly has been rebutted.

I find the appellant's arguments, as they relate to the validity of a discretionary dividend clause in terms of general corporate law and the requirements of the *S.B.C.A.*, to be equally unpersuasive. Counsel for the appellant placed considerable emphasis in his arguments upon the nature of a shareholder "right", arguing that for the purposes of the statute and common law, a right to a dividend comprises a right to a portion of the total dividend declared, calculated according to the terms set out in the share description if and when the directors decide to make a distribution of the profits of the company. The appellant argues that the insertion of a discretionary dividend clause in the Articles of Incorporation is insufficient to confer a "right" since no corresponding "duty" is imposed on the company to pay dividends on that class once a dividend has been declared. Implicitly, Desjardins J. accepted this argument when she referred to the ability of the directors to allocate dividends "at whim". The appellant argues that this unconstrained discretion cannot be considered a "right" which is conferred by the shares.

I disagree with this analysis. In my opinion, the fact that dividend rights are contingent upon the exercise of the discretion of the directors to allocate the declared dividend between classes of shares does not render entitlement to a dividend any less a "right". Rather, it is the entitlement to be considered for a dividend which is more properly characterized in those terms. I agree with the respondent that the Class B common shareholders of the company have an entitlement comparable to that of a fixed dividend holder to receive a dividend if the company's directors declare one. As well, the appellant's argument that there is no corresponding "duty" on directors as regards the

tion, être effectué selon le principe de l'égalité entre actionnaires.

Je suis entièrement d'accord avec le juge Strayer (à la p. 5) lorsqu'il déclare, en ce qui concerne la présomption d'égalité, que «les statuts de constitution prévoient exactement le contraire». À mon avis, il est donc évident que la présomption d'égalité a été repoussée.

J'estime que les arguments de l'appelant ayant trait à la validité d'une clause de dividende discrétionnaire au regard du droit général des sociétés et des exigences de la *S.B.C.A.* ne sont guère plus convaincants. L'avocat de l'appelant a beaucoup insisté, dans sa plaidoirie, sur la nature du «droit» d'un actionnaire, soutenant qu'aux fins de la Loi et de la common law le droit à un dividende comporte le droit à une fraction du dividende total déclaré, calculée conformément aux conditions énoncées dans la description des actions lorsque les administrateurs décident de répartir les profits de la société. L'appelant soutient que l'insertion d'une clause de dividende discrétionnaire dans l'acte constitutif ne suffit pas à conférer un «droit» étant donné qu'aucune «obligation» correspondante n'est imposée à la société de verser des dividendes pour cette catégorie une fois qu'un dividende a été déclaré. Le juge Desjardins a implicitement souscrit à cet argument lorsqu'elle a fait référence à la capacité des administrateurs de répartir les dividendes «selon leur fantaisie». L'appelant prétend que ce pouvoir discrétionnaire illimité ne saurait être considéré comme un «droit» conféré par les actions.

Je ne suis pas d'accord avec cette analyse. À mon avis, ce n'est pas parce que les droits aux dividendes dépendent de l'exercice par les administrateurs de leur pouvoir discrétionnaire de répartir le dividende déclaré entre les catégories d'actions qu'il ne s'agit pas d'un «droit». C'est plutôt le droit d'être pris en compte pour le partage d'un dividende qu'il convient davantage de qualifier ainsi. Je suis d'accord avec l'intimé pour dire que le droit des actionnaires ordinaires de la catégorie B de la société de recevoir un dividende, si les administrateurs de la société en déclarent un, est comparable à celui du détenteur d'un dividende fixe. En outre, je suis d'avis que l'argument de l'appelant suivant

"right" of shareholders is, in my view, specious. The directors are bound by their fiduciary duty to act in good faith for the best interests of the company in the declaration and allocation of any dividend. That duty is in no way circumvented by the presence of a discretionary dividend clause. Finally, I think that it should be borne in mind that many shareholder rights may be qualified and contingent (voting rights, the right to transfer shares, preferential rights to dividends, participation rights); yet the mere fact that these rights are fettered does not render them anything less than shareholder rights.

In a similar vein, I do not agree that the absence of a mathematical formula for the allocation of declared dividends in the Articles of Incorporation of the company is dispositive of the issue of the validity of the discretionary dividend clause. As the decision to declare a dividend and the determination of the funds available for a dividend are already within the discretion of the directors, it seems to me that a discretionary dividend clause is not a significant departure or extension of that discretion: *De Vall v. Wainwright Gas Co.*, [1932] 2 D.L.R. 145 (Alta. C.A.). If shares are divided into separate classes, one of which contains a preferred entitlement to dividends declared by the company, the directors effectively have the discretion to allocate dividends only to that preferred class. Thus, the respondent could have achieved precisely the same allocation of dividends by structuring the company so that Wilma McClurg and Suzanne Ellis constituted a preferred class of shareholders with first entitlement to dividends. Such a structure would be unimpeachable in terms of the principles of corporate law.

Furthermore, it cannot reasonably be maintained that the presence of a discretionary dividend clause inherently leads to a conflict of the duty of directors and their self-interest any more than does the discretion to declare a dividend in any company. Consequently, I cannot agree with

lequel les administrateurs n'ont aucune «obligation» correspondante par rapport au «droit» des actionnaires est spécieux. Les administrateurs sont tenus, en vertu de leur obligation fiduciaire, d'agir de bonne foi, au mieux des intérêts de la société en question, lorsqu'ils déclarent et répartissent un dividende. La présence d'une clause de dividende discrétionnaire ne fait nullement disparaître cette obligation. Enfin, je pense qu'il ne faut pas oublier que nombre de droits des actionnaires peuvent être restreints ou conditionnels (le droit de vote, le droit de céder des actions, les droits privilégiés aux dividendes, les droits de participation); néanmoins, ces droits n'en constituent pas moins des droits des actionnaires même s'ils font l'objet de restrictions.

Dans le même ordre d'idées, je ne saurais convenir que l'absence dans l'acte constitutif de la société d'une formule mathématique régissant le partage des dividendes déclarés tranche la question de la validité de la clause de dividende discrétionnaire. La décision de déclarer un dividende et la détermination des sommes disponibles à cette fin relevant déjà du pouvoir discrétionnaire des administrateurs, il me semble qu'une clause de dividende discrétionnaire ne constitue pas une dérogation importante à ce pouvoir ni une extension de sa portée: *De Vall v. Wainwright Gas Co.*, [1932] 2 D.L.R. 145 (C.A. Alb.). Lorsque les actions sont divisées en catégories distinctes, dont l'une comporte un droit privilégié aux dividendes déclarés par la société, les administrateurs possèdent réellement le pouvoir discrétionnaire de répartir les dividendes parmi les actionnaires de cette catégorie privilégiée seulement. Par conséquent, l'intimé aurait pu obtenir exactement la même répartition des dividendes en structurant la société de manière à ce que Wilma McClurg et Suzanne Ellis constituent une catégorie privilégiée d'actionnaires ayant un droit prioritaire aux dividendes. Une telle structure serait inattaquable suivant les principes du droit des sociétés.

De plus, on ne peut raisonnablement soutenir que la présence d'une clause de dividende discrétionnaire entraîne en soi un conflit entre l'obligation des administrateurs et leur intérêt personnel, pas plus d'ailleurs que ne le fait le pouvoir discrétionnaire de déclarer un dividende dans toute

those authors who take the position that the allocation of dividends by directors, pursuant to a discretionary dividend clause, inherently cannot be exercised in the best interests of the company: see Martel and Martel, *La compagnie au Québec, Les aspects juridiques*, vol. I, at pp. 18-10 through 18-14C; Boivin, "Le droit aux dividendes et le dividende 'discrétionnaire' " (1987), 47 *R. du B.* 73. I agree with the argument of the respondent that it is unrealistic to think that directors will not pay heed to the identity of shareholders and the contribution to the company of those shareholders any time a decision is made as to whether dividends of any sort should be declared. The fact that directors may consider the identity of shareholders does not necessarily render the declaration invalid on the basis of a conflict of duty and self-interest. For example, the discretion could be exercised for the purpose of rewarding a group of employees who comprise a preferred class of shareholders and who have been encouraged to invest in a company. Surely the fact that the identity of the holders of that class of shares was considered in the decision to declare a dividend and in the determination of the quantum of the dividend would not render the decision invalid. To reiterate, the limitation on the decision is purely a fiduciary one and the entitlement of a shareholder is "to share in the profits of the company when these are declared as dividends in respect of the shares of the class of which his share forms a part" (emphasis added): Bryden, "The Law of Dividends", in Jacob S. Ziegel, ed., *Studies in Canadian Company Law*, at p. 270. That right is in no way undermined by the presence of a discretionary dividend clause.

In other words, the clause simply divides conceptually into two components—declaration and allocation—what has been, traditionally, one decision. In substance, though, the discretion which lies in the hands of the directors has always included both, subject to the provisions of the Articles of Incorporation. In this regard, the only other limitation upon the directors of which I am aware is that "if a dividend is declared by [a] corporation ... there must be some shares entitled to receive

société. Par conséquent, je ne puis partager l'opinion des auteurs qui estiment que la répartition de dividendes par les administrateurs, conformément à une clause de dividende discrétionnaire, ne peut fondamentalement être effectuée au mieux des intérêts de la société: voir Martel et Martel, *La compagnie au Québec, Les aspects juridiques*, vol. I, aux pp. 18-10 à 18-14C; Boivin, «Le droit aux dividendes et le dividende «discrétionnaire» » (1987), 47 *R. du B.* 73. Je conviens avec l'intimé qu'il est irréaliste de croire que les administrateurs ne tiennent pas compte de l'identité des actionnaires ni de leur apport à la société lorsque vient le temps de décider si un dividende de quelque sorte que ce soit devrait être déclaré. La possibilité que les administrateurs tiennent compte de l'identité des actionnaires n'a pas nécessairement pour effet d'invalider la déclaration en raison d'un conflit entre leur obligation et leur intérêt personnel. Par exemple, ils pourraient exercer leur pouvoir discrétionnaire afin de récompenser un groupe d'employés englobant une catégorie privilégiée d'actionnaires et qui ont été encouragés à investir dans une société. La décision de déclarer un dividende ne deviendrait certainement pas nulle du fait qu'on a tenu compte de l'identité des détenteurs de cette catégorie d'actions pour prendre cette décision et pour déterminer le montant du dividende à verser. Je le répète, la limite à laquelle est assujettie cette décision est d'ordre purement fiduciaire et le droit d'un actionnaire est [TRADUCTION] «de recevoir sa part des profits de la société lorsqu'ils sont déclarés sous forme de dividendes relativement aux actions de la catégorie dont son action fait partie» (je souligne): Bryden, «The Law of Dividends», dans Jacob S. Ziegel, éd., *Studies in Canadian Company Law*, à la p. 270. Ce droit n'est nullement amoindri par la présence d'une clause de dividende discrétionnaire.

En d'autres termes, la clause ne fait que diviser, sur le plan conceptuel, en deux éléments—déclaration et répartition—ce qui, traditionnellement, constituait une seule décision. Au fond, pourtant, le pouvoir discrétionnaire des administrateurs a toujours comporté ces deux éléments, sous réserve des dispositions de l'acte constitutif de la société. À cet égard, la seule autre limite imposée aux administrateurs dont je sois au courant est que [TRADUCTION] «lorsqu'un dividende est déclaré

the dividend": Welling, *supra*, at pp. 588-89. The principle has been given statutory recognition in s. 24(4)(*b*) of the *S.B.C.A.* In my view, this rule is not defeated by the presence of the discretionary dividend clause because the identity of the class eligible for a dividend simply remains unknown until the allocation takes place. This conceptual division into declaration and allocation is not substantively different from any derogation from the presumption of equality in the payment of dividends. Consequently, for this Court to find that the use of a discretionary dividend clause on these facts was an invalid exercise of the discretion of the directors would be to defeat the substance of what was achieved solely on the basis of its form.

Finally, I question whether it would be appropriate for this Court to determine that the use of a discretionary dividend clause is invalid in the context of an income tax appeal. The purpose of the governing statute, the *S.B.C.A.*, is facilitative—that is, it allows parties, with certain explicit restrictions, to structure bodies corporate as they wish. As well, the Act provides the means for an aggrieved party—security holder, creditor, director or officer—whose interests have not been regarded fairly by the corporation, to seek redress through the oppression remedy in s. 234 of the Act. No such complaint has been lodged by any interested party in this case, presumably because all those involved in this company are satisfied with the way in which the directors are conducting its affairs. Furthermore, at common law it is a well-established principle that where shareholders are unanimously agreed to a transaction, inequality of treatment does not render it *ultra vires* the company: Wegenast, *The Law of Canadian Companies*, at pp. 321-22. As I have found that the use of a discretionary dividend clause is not prohibited expressly by the Act, nor contrary to common law or corporate law principles, I think the permissive spirit of the Act demands that a conclusion be reached that the use of the clause is valid. As Quessy, *supra*, explained, at p. 48, the use of the clause represents a legitimate exercise of the con-

par une société [...] il doit exister des actions donnant droit à ce dividende»: Welling, précité, aux pp. 588 et 589. Ce principe a été reconnu à l'al. 24(4)*b*) de la *S.B.C.A.* À mon avis, la présence de la clause de dividende discrétionnaire ne fait pas échec à cette règle parce que l'identité de la catégorie d'actions admissible à un dividende demeure tout simplement inconnue jusqu'au moment de la répartition. Cette division conceptuelle en déclaration et répartition n'est pas fondamentalement différente d'une dérogation à la présomption d'égalité dans le versement des dividendes. Par conséquent, si notre Cour devait conclure, compte tenu de ces faits, que l'utilisation d'une clause de dividende discrétionnaire constituait un exercice invalide du pouvoir discrétionnaire des administrateurs, ce serait faire échec pour des raisons de pure forme à ce qu'on a réussi à faire.

Enfin, je doute qu'il serait justifié pour notre Cour de statuer que l'utilisation d'une clause de dividende discrétionnaire est invalide dans le cadre d'un pourvoi en matière d'impôt sur le revenu. La loi applicable, la *S.B.C.A.*, a pour objet de faciliter les choses, c'est-à-dire qu'elle permet aux parties, sous certaines réserves explicites, de structurer les sociétés comme elles le désirent. De même, la Loi fournit à la partie lésée—peu importe qu'il s'agisse d'un détenteur de valeurs mobilières, d'un créancier, d'un administrateur ou d'un dirigeant—dont les intérêts n'ont pas été considérés d'une manière équitable par la société le moyen de demander réparation grâce au recours prévu à l'art. 234 de la Loi pour les cas d'abus. Aucune des parties intéressées n'a déposé une telle plainte en l'espèce, probablement parce que toutes les personnes en cause dans cette société sont satisfaites de la manière dont les administrateurs la gèrent. De plus, il est bien établi en common law que lorsque les actionnaires s'entendent unanimement sur une opération, celle-ci ne constitue pas un excès de pouvoir de la part de la société parce qu'il y a eu inégalité de traitement: Wegenast, *The Law of Canadian Companies*, aux pp. 321 et 322. Ayant conclu que l'utilisation d'une clause de dividende discrétionnaire n'est pas interdite expressément par la Loi, ni contraire à la common law ou aux principes du droit des sociétés, j'estime que l'esprit

tractual rights between shareholders and a company:

[TRANSLATION] ... the declaration and payment of a dividend by the directors on discretionary dividend shares is a legal act under the Corporations Acts when the articles contain a provision conferring greater discretion on them. We then have shares of the capital stock carrying the right to receive any dividend declared. Moreover, the articles contain an express provision indicating that the parties intend to derogate from the principle of equality among shareholders. Accordingly, as the parties to the contract are not acting contrary to public order and not infringing the law, we are of the view that the terms of the agreement concluded by them should be observed.

I agree with this conclusion. Professor Eisenberg, more than two decades ago, in his work on modern corporate law, "The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking" (1969), 57 *Cal. L. Rev.* 1, at p. 180, reasoned that "[i]n the case of the privately held corporation, legal rules governing internal decisionmaking should be suppletory in nature and based on the shareholders' probable expectations". Given that the legislature has not chosen to disallow the discretionary dividend clause, and no shareholder has taken remedial action against its use (presumably because shareholder expectations have been realized by its exercise), it would be paternalistic in the extreme for this Court to invalidate the clause at the behest of the appellant Minister of National Revenue. If the legislature determines that the use of the discretionary dividend clause undermines the reasonable expectations of shareholders or is in some way unfair to an interested party, then it is up to the legislature to limit the use of this means of structuring corporate affairs.

In conclusion, then, I find nothing untoward in the use of the discretionary dividend clause in the allocation of corporate dividends. There is nothing in the *S.B.C.A.* or at common law that prohibits this dividend allocation technique.

permissif de la Loi exige de conclure que l'utilisation de cette clause est valide. Comme l'a expliqué Quessy, précité, à la p. 48, l'utilisation de cette clause représente un exercice légitime des droits contractuels liant les actionnaires et une société:

... la déclaration et le versement d'un dividende par les administrateurs sur les actions à dividende discrétionnaire constituent un acte légal en regard des lois corporatives lorsque les statuts renferment une disposition qui leur confère une discrétion accrue. En effet, nous avons alors des actions du capital-actions qui donnent le droit de recevoir tout dividende déclaré. De plus, les statuts renferment une disposition expresse qui démontre que les parties entendent déroger au principe de l'égalité entre actionnaires. Ainsi, comme les parties au contrat ne vont pas à l'encontre de l'ordre public et ne dérogent pas à la loi, nous croyons qu'il faut respecter les conditions de l'accord qu'ils ont conclu.

Je partage cette conclusion. Il y a plus de vingt ans déjà, le professeur Eisenberg dans son ouvrage portant sur le droit des sociétés moderne, intitulé «The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking» (1969), 57 *Cal. L. Rev.* 1, à la p. 180, a tenu le raisonnement suivant: [TRADUCTION] «[d]ans le cas d'une société fermée, les règles juridiques régissant la prise de décisions internes ne devraient être que de nature supplétive et fondées sur les attentes probables des actionnaires». Étant donné que le législateur n'a pas choisi d'interdire la clause de dividende discrétionnaire, et qu'aucun actionnaire n'a exercé de recours contre son utilisation (probablement parce que celle-ci a permis de satisfaire aux attentes des actionnaires), notre Cour ferait montre d'un paternalisme excessif si elle décidait d'annuler la clause à la demande du ministre du Revenu national appelant. Si le législateur détermine que l'utilisation de la clause de dividende discrétionnaire mine les attentes raisonnables des actionnaires ou est injuste de quelque manière que ce soit envers une partie intéressée, il lui incombe de restreindre l'utilisation de ce moyen de structurer les activités des sociétés.

Je conclus donc qu'il n'y a rien de répréhensible à utiliser une clause de dividende discrétionnaire pour répartir les dividendes d'une société. D'ailleurs, rien dans la *S.B.C.A.* ou la common law n'interdit l'usage de cette méthode de répartition des dividendes.

2. *Income Tax Implications*

Having dealt with the corporate law issues raised by the use of a discretionary dividend clause, I now turn to the primary issue raised in this appeal, namely, the tax consequences of the allocation of dividends made pursuant to the clause. This analysis entails an examination of s. 56(2) of the *Income Tax Act* and its application to the facts at bar. Before proceeding with that analysis, though, I would like to review briefly the method of interpretation to be followed in applying the section.

Interpretation of Taxing Statutes

In recent years this Court, in an income tax appeal, has found it beneficial to engage explicitly in the development of an interpretative approach to the *Income Tax Act*, an approach which is wedded neither to a rule of "strict construction" nor to an all-encompassing test of "independent business purpose". This trend began with the judgment of Estey J. in his majority reasons in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536. In that case, Estey J. undertook an extensive discussion of interpretative techniques, and he drew a conclusion as to the preferred approach to be taken by the courts, at p. 576:

> It seems more appropriate to turn to an interpretation test which would provide a means of applying the Act so as to affect only the conduct of a taxpayer which has the designed effect of defeating the expressed intention of Parliament. In short, the tax statute, by this interpretative technique, is extended to reach conduct of the taxpayer which clearly falls within "the object and spirit" of the taxing provisions.

Estey J. expanded upon this test of "object and spirit" in his majority judgment in *The Queen v. Golden*, [1986] 1 S.C.R. 209, at pp. 214-15:

> ... 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

2. *Les incidences fiscales*

Ayant traité les questions que soulève, en matière de droit des sociétés, l'utilisation d'une clause de dividende discrétionnaire, j'examine maintenant le principal point soulevé dans le présent pourvoi, soit les incidences fiscales d'une répartition des dividendes effectuée conformément à cette clause. Une telle analyse nécessite un examen du par. 56(2) de la *Loi de l'impôt sur le revenu* et de son application aux faits de l'espèce. Avant d'effectuer cette analyse, j'aimerais cependant revoir brièvement la manière dont il faut interpréter ce paragraphe.

L'interprétation des lois fiscales

Au cours des dernières années, notre Cour a jugé bon, dans un pourvoi en matière d'impôt sur le revenu, de se lancer explicitement dans la conception d'une méthode d'interprétation de la *Loi de l'impôt sur le revenu*, méthode qui n'est liée ni à une règle d'«interprétation stricte» ni à un critère global de «l'objet commercial indépendant». Cette tendance a commencé dans les motifs majoritaires du juge Estey dans l'affaire *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, où il a procédé à un examen approfondi des techniques d'interprétation et tiré une conclusion quant à la méthode que devraient préférer les tribunaux (à la p. 576):

> Il paraît plus approprié d'avoir recours à un critère d'interprétation qui permettrait d'appliquer la Loi de manière à viser seulement la conduite du contribuable qui a comme effet intentionnel de contourner la volonté expresse du législateur. En bref, cette technique d'interprétation fait porter la législation fiscale sur la conduite du contribuable qui relève manifestement de l'objet et de l'esprit des dispositions fiscales.

Le juge Estey s'est étendu sur ce critère de «l'objet et de l'esprit» dans l'opinion majoritaire qu'il a rédigée dans l'affaire *La Reine c. Golden*, [1986] 1 R.C.S. 209, aux pp. 214 et 215:

> ... 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

interpretation applicable to taxation statutes in an era such as the present . . . .

More recently, in *Bronfman Trust v. The Queen*, [1987] 1 S.C.R. 32, I described the approach in terms of the need to discern the commercial reality of a taxpayer's transaction, 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 . . . a "common sense appreciation of all the guiding features" of the events in 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.

Thus, in proceeding to analyze the tax consequences of the application of the discretionary dividend clause, it is necessary to determine both the purpose of the legislative provision and the economic and commercial reality of the taxpayer's actions. To a certain extent, the latter inquiry in the case at bar already has been answered by my determination that the use of the discretionary dividend clause is a valid means whereby directors of a company can distribute dividends. The question also is answered, in part, by the fact that it was not argued by the appellant that the payment of dividends to Wilma McClurg was a "sham". Therefore, to use the words of Estey J. in *Stubart Investments Ltd.*, *supra*, at p. 572, it cannot be said that the transaction was "constructed as to create a false impression in the eyes of a third party, specifically the taxing authority". Having

plus sa place dans les règles d'interprétation applicables aux lois fiscales à une époque comme la nôtre . . . .

Plus récemment, dans l'arrêt *Bronfman Trust c. La Reine*, [1987] 1 R.C.S. 32, j'ai décrit cette méthode en fonction de la nécessité de déterminer la véritable nature commerciale de l'opération du contribuable, 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 [. . .] une [TRADUCTION] «appréciation saine de toutes les caractéristiques directrices» des événements en question . . .
>
> 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.

Il est donc nécessaire, pour analyser les incidences fiscales de l'application d'une clause de dividende discrétionnaire, de déterminer à la fois l'objet de la disposition législative et les réalités commerciales et économiques des opérations du contribuable. En l'espèce, j'ai déjà répondu dans une certaine mesure à cette dernière question en statuant que l'utilisation d'une clause de dividende discrétionnaire constitue une méthode légitime à laquelle les administrateurs peuvent recourir pour répartir les dividendes d'une société. Une réponse partielle découle également du fait que l'appelant n'a pas allégué que le versement de dividendes à Wilma McClurg était feint. Par conséquent, pour reprendre les termes du juge Estey dans l'affaire *Stubart Investments Ltd.*, précitée, à la p. 572, on ne peut affirmer que l'opération a été «réalisée [. . .] de manière à créer une fausse impression pour les tiers, notamment les autorités fiscales». Ces questions préliminaires étant tranchées, il est

determined these preliminary issues, the purpose of s. 56(2) can be examined.

Subsection 56(2) of the *Income Tax Act*

In attempting to discern the purpose of s. 56(2), it is helpful to refer to the body of jurisprudence dealing with the subsection. A useful starting point is an early case dealing with the predecessor section to s. 56(2): *Miller v. M.N.R.*, 62 D.T.C. 1139 (Ex. Ct.). In that case, Thurlow J., as he then was, in examining s. 16(1) of the Act, made some general comments, at p. 1147, as to the anti-avoidance purpose of the provision which remain relevant today:

> In my opinion, s. 16(1) is intended to cover cases where a taxpayer seeks to avoid receipt of what in his hands would be income by arranging to have the amount received by some other person whom he wishes to benefit or by some other person for his own benefit. The scope of the subsection is not obscure for one does not speak of benefitting a person in the sense of the subsection by making a business contract with him for adequate consideration.

Strayer J. noted, at p. 4, in respect of the *Miller* case:

> Two important qualifications are noted here: the first is that the taxpayer seek "to avoid receipt" of funds, presumably funds that would otherwise be payable to him; and the second is that the concept of payment of a "benefit" is contrasted to payments for adequate consideration.

In my opinion, the views of Thurlow J. and Strayer J. provide a sound foundation for the interpretation of s. 56(2). The subsection obviously is designed to prevent avoidance by the taxpayer, through the direction to a third party, of receipts which he or she otherwise would have obtained. I agree with both Thurlow J. and Strayer J. in their characterization of the purpose of the section and, specifically, I concur with their view that the section reasonably cannot have been intended to cover benefits conferred for adequate consideration in the context of a legitimate business relationship.

maintenant possible d'examiner l'objet du par. 56(2).

Le paragraphe 56(2) de la *Loi de l'impôt sur le revenu*

Il est utile, pour tenter de découvrir l'objet du par. 56(2), de se reporter à la jurisprudence traitant de ce paragraphe. Une décision ancienne concernant la disposition qui a précédé le par. 56(2), l'arrêt *Miller c. M.N.R.*, 62 D.T.C. 1139 (C. de l'É.) constitue un excellent point de départ. Dans cette affaire, le juge Thurlow, alors juge puîné, a fait lors de son examen du par. 16(1) de la Loi quelques observations générales, à la p. 1147, encore pertinentes aujourd'hui, sur l'objet de cette disposition, c.-à-d. empêcher l'évitement fiscal:

> [TRADUCTION] À mon avis, l'art. 16(1) vise les cas où un contribuable cherche à éviter de recevoir ce qui, entre ses mains, serait un revenu lorsqu'il fait en sorte que le montant soit reçu par une autre personne dont il souhaite qu'elle tire un avantage ou par une autre personne pour son propre avantage. La portée de ce paragraphe n'est pas équivoque, car on ne peut prétendre qu'un contribuable qui conclut un contrat commercial à titre onéreux avec une autre personne lui accorde un avantage au sens du paragraphe.

Le juge Strayer fait observer, à la p. 4, relativement à l'affaire *Miller*:

> Deux réserves importantes sont mises en évidence ici. En premier lieu, le contribuable doit avoir cherché «à éviter de recevoir» un revenu qui lui aurait censément été payé. En second lieu, la distinction est faite entre le concept de versement d'un «avantage» et le paiement fait pour une contrepartie suffisante.

À mon avis, les points de vue des juges Thurlow et Strayer constituent un bon point de départ pour l'interprétation du par. 56(2). Ce paragraphe vise manifestement à empêcher le contribuable d'éviter le paiement de l'impôt en versant à un tiers les recettes qu'il aurait autrement touchées. Je suis d'accord avec la qualification de l'objet de cette disposition faite par les juges Thurlow et Strayer et, plus particulièrement, je conviens avec eux qu'on ne peut raisonnablement croire que le législateur a voulu que cette disposition s'applique aux avantages conférés moyennant une contrepartie suffisante dans le cadre d'une relation d'affaires légitime.

Application to the Facts

Having discerned the purpose of the section and the proper approach in interpretation, the next step in the analysis is apparent: a determination of the commercial reality and practical nature of the respondent's transactions which were the subject of reassessment by the Department of National Revenue. Urie J. in the Court of Appeal found the determination that the transaction occurred in the context of a director-shareholder relationship to be dispositive. I agree with that conclusion, and with the skepticism expressed by Le Dain J. in *Perrault v. The Queen*, [1979] 1 F.C. 155 (C.A.), at pp. 165-66, where he questioned whether the words of s. 56(2) "were intended to apply to the payment of a dividend". While it is always open to the Courts to "pierce the corporate veil" in order to prevent parties from benefitting from increasingly complex and intricate tax avoidance techniques, in my view a dividend payment does not fall within the scope of s. 56(2). The purpose of s. 56(2) is to ensure that payments which otherwise would have been received by the taxpayer are not diverted to a third party as an anti-avoidance technique. This purpose is not frustrated because, in the corporate law context, until a dividend is declared, the profits belong to a corporation as a juridical person: Welling, *supra*, at pp. 609-10. Had a dividend not been declared and paid to a third party, it would not otherwise have been received by the taxpayer. Rather, the amount simply would have been retained as earnings by the company. Consequently, as a general rule, a dividend payment cannot reasonably be considered a benefit diverted from a taxpayer to a third party within the contemplation of s. 56(2).

The appellant argues, and Desjardins J. accepted in dissent in the Court of Appeal, that s. 56(2) may be invoked at the point when the allocation is made of a dividend declared by the directors pursuant to the discretionary dividend clause. It is submitted that because, once declared, a dividend must be receivable by one class of shares pursuant

Application aux faits

L'objet de l'article et la méthode appropriée pour l'interpréter ayant été établis, l'étape suivante de l'analyse consiste manifestement à déterminer la véritable nature commerciale et pratique des opérations de l'intimé qui ont fait l'objet d'une nouvelle cotisation établie par le ministère du Revenu national. Le juge Urie de la Cour d'appel a conclu que la décision de considérer que l'opération s'était produite dans le cadre des rapports existant entre les administrateurs et les actionnaires tranchait la question. Je suis d'accord avec cette conclusion ainsi qu'avec le scepticisme exprimé par le juge Le Dain dans l'arrêt *Perrault c. La Reine*, [1979] 1 C.F. 155 (C.A.), à la p. 166, où il a fait valoir qu'il doutait que «le législateur ait entendu appliquer» les termes du par. 56(2) «au paiement d'un dividende». Bien qu'il soit toujours loisible aux tribunaux de «percer le voile corporatif» afin d'empêcher les parties de profiter de techniques d'évitement fiscal de plus en plus complexes, je suis d'avis que le versement d'un dividende n'est pas visé par le par. 56(2). Ce dernier a pour objet d'assurer que les paiements qui auraient autrement été reçus par le contribuable ne soient pas détournés au profit d'un tiers comme technique d'évitement fiscal. Cet objet n'est pas contrecarré parce que, dans le contexte du droit des sociétés, les profits appartiennent à la société en sa qualité de personne juridique tant qu'un dividende n'est pas déclaré: Welling, précité, aux pp. 609 et 610. Si aucun dividende n'avait été déclaré ni versé à un tiers, il n'aurait pas non plus été touché par le contribuable. Ce montant aurait plutôt simplement fait partie des bénéfices non distribués de la société. Par conséquent, en règle générale, le versement d'un dividende ne peut raisonnablement être considéré comme un avantage détourné par un contribuable en faveur d'un tiers au sens du par. 56(2).

L'appelant fait valoir, ce qu'accepte dans sa dissidence le juge Desjardins de la Cour d'appel, que le par. 56(2) peut être invoqué lorsqu'il y a répartition d'un dividende déclaré par les administrateurs conformément à la clause de dividende discrétionnaire. Il soutient qu'étant donné qu'une fois qu'il a été déclaré, le dividende doit être

to s. 24(4)(*b*) of the *S.B.C.A.*, a portion of the dividend would have been received by the respondent in his capacity as shareholder had the payments not been directed to Wilma McClurg by him in his capacity as director. However, in discussing the use of the discretionary dividend clause, I have already concluded that its validity rests, in part, on the fact that allocations made pursuant to the clause are substantively no different from allocations made pursuant to a mathematical formula in the articles of incorporation of a company. Given that determination, it would be formalistic in the extreme to reach the conclusion that but for the payment to a third party shareholder, a director-shareholder would be the recipient of a portion of the payment. Instead, my view is that an allocation pursuant to a discretionary dividend clause is no different from the payment of a dividend generally. In both cases, but for the declaration (and allocation), the dividend would remain part of the retained earnings of the company. That cannot legitimately be considered as within the parameters of the legislative intent of s. 56(2). If this Court were to find otherwise, corporate directors potentially could be found liable for the tax consequences of any declaration of dividends made to a third party. I agree with both Urie J. and Strayer J. in the courts below that this would be an unrealistic interpretation of the subsection consistent with neither its object nor its spirit. It would violate fundamental principles of corporate law and the realities of commercial practice and would "overshoot" the legislative purpose of the section.

Although I have concluded that s. 56(2) does not apply to the declaration of dividends generally, its application also would be contrary to the commercial reality of this particular transaction. Strayer J. reviewed the evidence and reached the conclusion that the background and context of the transaction could be described as a "legitimate business relationship" (at p. 5), and he found that:

> ... the plaintiff's wife had made a real contribution to the establishment of the company and business through

réparti dans une catégorie d'actions conformément à l'al. 24(4)*b*) de la *S.B.C.A.*, l'intimé aurait touché une fraction du dividende en sa qualité d'actionnaire si, en tant qu'administrateur, il n'avait pas fait effectuer les paiements à Wilma McClurg. Toutefois, lors de mon analyse de l'utilisation de la clause de dividende discrétionnaire, j'ai déjà conclu que la validité de cette clause découle en partie du fait qu'il n'y a pas de différence fondamentale entre les répartitions effectuées conformément à celle-ci et les répartitions effectuées conformément à une formule mathématique prévue dans l'acte constitutif d'une société. Compte tenu de cette décision, ce serait faire preuve d'un formalisme excessif que de conclure que, sans le versement effectué à un tiers actionnaire, un administrateur actionnaire toucherait une fraction du versement. J'estime plutôt qu'une répartition effectuée conformément à une clause de dividende discrétionnaire ne se distingue pas du versement d'un dividende en général. Dans les deux cas, le dividende continuerait à faire partie des bénéfices non distribués de la société, si ce n'était de la déclaration du dividende (et de sa répartition). On ne peut légitimement considérer que telle était l'intention du législateur au par. 56(2). Si notre Cour devait conclure le contraire, les administrateurs des sociétés pourraient vraisemblablement être tenus responsables des incidences fiscales de toute déclaration de dividendes faite à un tiers. À l'instar des juges Urie et Strayer des tribunaux d'instance inférieure, je conviens qu'il s'agirait alors d'une interprétation irréaliste ne respectant ni l'objet, ni l'esprit de ce paragraphe. Cela violerait les principes fondamentaux du droit des sociétés ainsi que les réalités des pratiques commerciales, et cela irait au-delà de l'intention du législateur.

Même si j'ai conclu que le par. 56(2) ne s'applique pas à la déclaration des dividendes en général, son application serait également contraire à la véritable nature commerciale de cette opération particulière. Le juge Strayer a examiné la preuve et a conclu qu'on pouvait considérer que les circonstances de l'opération constituaient une «relation d'affaires légitime» (p. 5), et il a ajouté:

> ... la femme du demandeur avait fourni un apport très réel à la mise sur pied de la société et de l'entreprise, au

the personal guarantee she gave and the share of the mortgage she assumed on their jointly-owned home. The evidence presented before me also satisfied me that she had taken an active part in the operation of the business to the extent of her abilities and the requirements of the situation.

I find this conclusion to be completely supported by the evidence. Wilma McClurg played a vital role in the financing of the formation of the company. Although I agree with Desjardins J., at p. 370 that, with respect to a shareholder, "dividends come as a return on his or her investment", in my view there is no question that the payments to Wilma McClurg represented a legitimate *quid pro quo* and were not simply an attempt to avoid the payment of taxes. In my opinion, Goetz T.C.J. erred when he found that the dividends were a blatant attempt at tax avoidance. Indeed, his dismissal of the relevance of Wilma McClurg's contribution to the company and his description of her and Suzanne Ellis as "puppets" pay no regard to the very real contributions, financial and operational, made by Wilma McClurg. Furthermore, the efforts expended by Wilma McClurg in the operation of Northland Trucks, while not dispositive of the issue raised in this appeal, do provide further evidence that the dividend payment was the product of a *bona fide* business relationship.

In my opinion, if a distinction is to be drawn in the application of s. 56(2) between arm's length and non-arm's length transactions, it should be made between the exercise of a discretionary power to distribute dividends when the non-arm's length shareholder has made no contribution to the company (in which case s. 56(2) may be applicable), and those cases in which a legitimate contribution has been made. In the case of the latter, of which this appeal is an example, I do not think it can be said that there was no legitimate purpose to the dividend distribution.

III. Disposition

In conclusion, I have found that: (i) the discretionary dividend clause is valid in terms of the principles of corporate law and the provisions of

moyen de la garantie personnelle qu'elle a donnée et de sa part de l'hypothèque qu'elle a assumée sur la maison qu'elle possédait conjointement avec le demandeur. En outre, la preuve soumise m'a convaincu qu'elle avait joué un rôle actif dans l'exploitation de l'entreprise, dans la mesure de ses capacités et des besoins de la situation.

J'estime que cette conclusion est entièrement justifiée par la preuve. Wilma McClurg a joué un rôle capital dans le financement et la constitution de la société. Bien que je convienne avec le juge Desjardins, à la p. 370, que les «dividendes représentent le rapport d'un investissement» d'un actionnaire, il ne fait aucun doute, à mon avis, que les versements effectués à Wilma McClurg représentaient une contrepartie légitime et non simplement une tentative d'éviter le paiement de l'impôt. À mon avis, le juge Goetz a eu tort de conclure que les dividendes avaient constitué un effort manifeste d'éviter le paiement de l'impôt. En fait, en décidant que l'apport de Wilma McClurg à la société n'avait aucune pertinence et en décrivant cette dernière et Suzanne Ellis comme des «jouets», il n'a pas tenu compte des apports très réels de Wilma McClurg quant au financement et à l'exploitation de l'entreprise. De plus, les efforts déployés par Wilma McClurg dans l'exploitation de Northland Trucks, même s'ils ne sont pas décisifs quant à la question soulevée dans le présent pourvoi, constituent néanmoins une preuve supplémentaire que le versement de dividendes était le résultat d'une relation d'affaires normale.

À mon avis, si une distinction s'impose dans l'application du par. 56(2) entre les opérations effectuées avec ou sans lien de dépendance, il faut la faire entre l'exercice du pouvoir discrétionnaire de répartir des dividendes lorsque l'actionnaire ayant un lien de dépendance n'a fourni aucun apport à la société (auquel cas le par. 56(2) peut s'appliquer) et les cas où un apport légitime a été fourni. Dans ce dernier cas, dont le présent pourvoi constitue un exemple, je ne crois pas que l'on puisse affirmer que le partage des dividendes ne visait pas un objectif légitime.

III. Dispositif

Je conclus donc: (i) que la clause de dividende discrétionnaire est valide au regard des principes du droit des sociétés et des dispositions de la

the Saskatchewan *Business Corporations Act*; (ii) the declaration of a dividend is normally beyond the scope of s. 56(2) of the *Income Tax Act*; and, (iii) the facts at bar provide no evidence that the business arrangement was an attempt at tax avoidance, but rather that it was the product of a business contract made for adequate consideration. As a result, I would dismiss the appeal. Pursuant to the order of this Court granting leave to appeal in this case, costs of the appeal will be payable by the appellant on a solicitor-client basis.

The reasons of Wilson, La Forest and L'Heureux-Dubé JJ. were delivered by

LA FOREST J. (dissenting)—This appeal is concerned with whether money received by Wilma McClurg, wife of the respondent Jim A. McClurg, by virtue of a "discretionary dividend" clause, may properly be attributed to the respondent pursuant to s. 56(2) of the *Income Tax Act*, S.C. 1970-71-72, c. 63. The facts and the judgments of the courts below have been set out at length in Chief Justice Dickson's reasons, and I do not propose to repeat them. Rather, I will proceed directly to the legal analysis. Following the basic framework of the opinion of the Chief Justice, the discussion is divided into issues of corporate and tax law.

Corporate Law Issues

Simply put, the corporate law question raised by this appeal is whether the clause in Northland Trucks (1978) Ltd.'s Articles of Incorporation purporting to give each class of shares the "right to receive dividends exclusive of other classes of shares in the said corporation" is a valid allocation of power to the directors of the corporation under the Saskatchewan *Business Corporations Act*, R.S.S. 1978, c. B-10. The clause is referred to as a "discretionary dividend" clause because the mode of distribution of dividends is not determined by the Articles of Incorporation themselves, but is left to the "discretion" of the directors of the company.

Business Corporations Act de la Saskatchewan, (ii) que la déclaration d'un dividende n'est normalement pas visée par le par. 56(2) de la *Loi de l'impôt sur le revenu*, et (iii) que les faits de l'espèce ne fournissent aucun élément de preuve que l'entente commerciale constituait une tentative d'éviter le paiement de l'impôt, mais qu'il s'agissait plutôt du résultat d'un contrat d'affaires conclu moyennant une contrepartie suffisante. Par conséquent, je suis d'avis de rejeter le pourvoi. Conformément à l'ordonnance de notre Cour autorisant le présent pourvoi, les dépens devront être payés par l'appelant comme entre procureur et client.

Version française des motifs des juges Wilson, La Forest et L'Heureux-Dubé rendus par

LE JUGE LA FOREST (dissident)—Le présent pourvoi vise à déterminer si l'argent reçu par Wilma McClurg, l'épouse de l'intimé Jim A. McClurg, en vertu d'une clause de «dividende discrétionnaire» peut à bon droit être attribué à l'intimé en vertu du par. 56(2) de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63. Les faits et les décisions des tribunaux d'instance inférieure ont été exposés en détail dans les motifs du juge en chef Dickson et je n'entends pas les répéter. Je vais plutôt procéder directement à une analyse juridique. Suivant le cadre dans lequel le Juge en chef a prononcé ses motifs, cette analyse porte à la fois sur des questions relatives au droit des sociétés et au droit fiscal.

Questions relatives au droit des sociétés

En bref, la question relative au droit des sociétés soulevée en l'espèce est de savoir si la clause de l'acte ou des statuts constitutifs de Northland Trucks (1978) Ltd. qui vise à donner à chacune des catégories d'actions le «droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions dans ladite société» confère un pouvoir légitime aux administrateurs de la société en vertu de la *Business Corporations Act* de la Saskatchewan, R.S.S. 1978, ch. B-10. Cette clause est appelée clause de «dividende discrétionnaire» parce que le mode de distribution des dividendes n'est pas déterminé par les statuts constitutifs eux-mêmes et qu'il est laissé à la «discrétion» des administrateurs de la compagnie.

In a certain sense, the term "discretionary dividend" is a misnomer, since it is a well-accepted principle of common law that the directors of a corporation have the discretion to determine if and when a dividend should be declared, and in what amount. This discretion is, of course, subject to certain reasonable limitations. For example, s. 40(*a*) of the Saskatchewan *Business Corporations Act* provides that a dividend may not be declared if there are reasonable grounds to believe such declaration would render the corporation unable to pay its debts. As well, there is the overriding principle that the discretion must always be exercised in a manner which is in the best interests of the corporation; see Welling, *Corporate Law in Canada* (1984), at p. 614.

Although the term "discretionary dividend" may be somewhat misleading, it is nonetheless not difficult to understand how the label itself was first chosen. Clauses such as the one contained in the Articles of Incorporation of Northland Trucks give directors a power of discretion that they never previously had: the power to discriminate between different classes of shares when determining how a dividend should be distributed. Is this allocation of power to the directors valid under the Saskatchewan *Business Corporations Act*? To answer this question, it is necessary to examine both the principles at common law and the statute itself.

The Common Law

Since the famous decision of the House of Lords in *Salomon v. Salomon and Co.*, [1897] A.C. 22, it has been a settled proposition of law that a corporation has a separate legal existence, independent from that of its shareholders. Even before *Salomon*, it had been said that it was this proposition that lay at the "root" of corporate law: *Farrar v. Farrars, Limited* (1888), 40 Ch. D. 395, at pp. 409-10.

The independent legal existence of the corporation means that, while the shareholder remains a proportionate owner of the corporation, he does not actually own its assets. These assets belong to

Dans un certain sens, le terme «dividende discrétionnaire» est mal choisi, puisque c'est un principe reconnu en common law que les administrateurs d'une société ont le pouvoir discrétionnaire de déterminer si et quand un dividende doit être déclaré et pour quel montant. Ce pouvoir discrétionnaire est bien sûr assujetti à certaines limites raisonnables. Par exemple, l'al. 40*a*) de la *Business Corporations Act* de la Saskatchewan prévoit qu'un dividende ne peut être déclaré s'il y a des motifs raisonnables de croire que cela empêcherait la société de rembourser ses dettes. De même, il existe un principe dominant selon lequel le pouvoir discrétionnaire doit toujours être exercé dans l'intérêt de la société; voir l'article de Welling intitulé *Corporate Law in Canada* (1984), à la p. 614.

Même si le terme «dividende discrétionnaire» peut dans une certaine mesure être trompeur, il est néanmoins facile de comprendre comment l'étiquette elle-même a d'abord été choisie. Les clauses comme celles qui figurent dans les statuts constitutifs de Northland Trucks confèrent aux administrateurs un pouvoir discrétionnaire qu'ils n'ont jamais eu auparavant: le pouvoir d'effectuer une disparité de traitement entre différentes catégories d'actions lorsqu'ils déterminent comment un dividende devrait être distribué. Cette attribution de pouvoir aux administrateurs est-elle valide en vertu de la *Business Corporations Act* de la Saskatchewan? Pour répondre à cette question, il faut examiner tant les principes de la common law que la loi elle-même.

La common law

Le fameux arrêt de la Chambre des lords dans *Salomon v. Salomon and Co.*, [1897] A.C. 22 a reconnu le principe de droit selon lequel une société constitue une entité juridique distincte de celle de ses actionnaires. Même avant cet arrêt, il a été établi que ce principe constituait le fondement du droit des sociétés: *Farrar v. Farrars, Limited* (1888), 40 Ch. D. 395, aux pp. 409 et 410.

L'entité juridique distincte de la société signifie que même si l'actionnaire demeure propriétaire de ladite société en proportion des actions qu'il détient, les actifs de cette dernière ne lui appar-

the corporation itself, as a separate legal entity; Schmitthoff, *Palmer's Company Law* (23rd ed. 1982), vol. 1, at p. 384, para. 33-01. Management of the corporation is entrusted to its officers and directors with the shareholder's interest protected through the distribution of shareholder votes. Thus, the corporate entity is unique in that it allows the shareholder to alienate ownership of property by placing it in a structure where the ownership of the property is separated from the effective control over that property; see Welling, *supra*, at p. 81. The sole link between the shareholder and the company is the share, which provides both a measure of the shareholder's interest in the company, as well as of the extent of the shareholder's liability for the actions of that company: see *Borland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279, at p. 288.

This separation of ownership and control provides the basis for many of the fundamental principles of corporate law. One example is the principle that the directors and officers of a corporation owe a fiduciary duty to the corporation: see *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592. In recognizing for the first time that the fiduciary duty owed by directors to the corporation should be extended to senior officers of the corporation as well, this Court focused upon the degree of control that the officers were in a position to exercise in that case. Laskin J., as he then was, speaking for the Court, there stated, at p. 610:

Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour.

tiennent pas. Ces actifs appartiennent à la société elle-même à titre d'entité légale distincte; Schmitthoff, *Palmer's Company Law* (23e éd. 1982), vol. 1, à la p. 384, par. 33-01. La gestion de la société est confiée à ses cadres et administrateurs tandis que les intérêts de l'actionnaire sont protégés par son droit de vote. Ainsi, l'entité constituée qu'est la société unique dans la mesure où elle permet à l'actionnaire d'aliéner la propriété des biens d'une façon telle que la propriété en question est distincte du contrôle effectif exercé sur ces biens: voir Welling, précité, à la p. 81. Le seul lien qui existe entre l'actionnaire et la compagnie est l'action, qui mesure à la fois l'intérêt de l'actionnaire dans la compagnie et l'étendue de la responsabilité de l'actionnaire à l'égard des actes de cette compagnie: voir *Borland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279 à la p. 288.

Cette séparation de la propriété et du contrôle sert de base à plusieurs des principes fondamentaux du droit des sociétés. Mentionnons à titre d'exemple le principe selon lequel les administrateurs et les cadres d'une société ont une obligation de fiduciaire envers celle-ci: voir l'arrêt *Canadian Aero Service Ltd. c. O'Malley*, [1974] R.C.S. 592. En reconnaissant pour la première fois que l'obligation de fiduciaire des administrateurs envers la société devrait s'étendre à ses cadres supérieurs, notre Cour a mis l'accent sur le degré de contrôle que les cadres étaient en mesure d'exercer dans cette affaire. Voici ce qu'a affirmé le juge Laskin (plus tard Juge en chef), au nom de la Cour, à la p. 610:

En appliquant strictement ce principe aux administrateurs et aux fonctionnaires supérieurs, on ne fait que reconnaître le degré d'autorité que leur confère leur poste sur les activités de la compagnie, autorité qui transcende l'obligation courante de rendre compte aux propriétaires actionnaires et qui n'est contrôlée de quelque façon qu'aux assemblées annuelles générales ou aux assemblées spéciales. Il constitue un complément nécessaire, dans l'intérêt public, des réglementation et obligation de rendre compte légales qui elles-mêmes sont à la fois une reconnaissance de l'importance de la compagnie au sein de la collectivité et du besoin de l'assujettir, ainsi que ses promoteurs, administrateurs et directeurs, aux normes régissant le comportement exemplaire.

Another principle that I believe also stems logically from the separation of ownership and control inherent in the corporation is the principle of equality of shares. Since the shareholders are only proportionate owners of the company, if their interest is to be adequately and fairly protected, those in the position of control must treat all the shareholders, or more accurately, all the shares, equally. Thus see Schmitthoff, *supra*, at p. 387, para. 33-06:

> Prima facie the rights carried by the shares rank *pari passu*, *i.e.* the shareholders participate in the benefits of membership equally. It is only when a company divides its share capital into different classes with different rights attached to them that the prima facie presumption of equality of shares may be displaced.

In my opinion, the principle of equality of shares, like the principle of fiduciary duty, developed as more than just a mere contractual right—it was a measure of protection for the shareholder that arose as a practical consequence of the unique nature of the corporate structure itself. This is so even though the parties could contract out of it to the extent that shares could be created that did not themselves have equal rights. In such a situation, the shareholder was still protected by virtue of the common law rule that shareholder rights had to be attached to the share itself, and not to the individual shareholder. Thus, while the shares had differentiated rights depending upon the particular class to which they belonged, the shareholder himself could not be discriminated against. For example, even when different classes of shares were created, the shares within the various classes themselves still had to be treated on an equal basis. It is thus put by Wegenast, *The Law of Canadian Companies* (1979), at pp. 320-21:

> Apart from provisions, duly adopted, for preferences as between different classes of shares, and, where there are such preferences, then as amongst the members in each respective class, shareholders are entitled to be treated on a basis of equality. Shareholders may differ as to the wisdom of a particular course of action, but once adopted it must be carried out without discrimina-

Un autre principe qui, selon moi, découle aussi logiquement de la séparation de la propriété et du contrôle inhérente à la société est celui de l'égalité des actions. Puisque les actionnaires ne sont propriétaires de la compagnie qu'en proportion des actions qu'ils détiennent, si l'on veut que leur intérêt soit protégé adéquatement et équitablement, ceux qui sont en position de contrôle doivent traiter tous les actionnaires, ou plus précisément toutes les actions, sur un pied d'égalité. Voir à ce sujet Schmitthoff, précité, à la p. 387, par. 33-06:

> [TRADUCTION] À première vue, les droits que comportent les actions sont de même rang, c.-à-d. que les actionnaires participent également aux bénéfices découlant dans leur appartenance à la compagnie. Ce n'est que lorsque la compagnie divise son capital-actions en différentes catégories assorties de droits différents qu'il peut y avoir déplacement de la présomption *prima facie* d'égalité des actions.

À mon avis, le principe de l'égalité des actions, comme celui de l'obligation fiduciaire, constitue plus qu'un simple droit contractuel—il représente pour l'actionnaire une mesure de protection qui est une conséquence pratique de la nature unique de la structure elle-même de la société. Il en est ainsi même si les parties peuvent s'y soustraire dans la mesure où l'on peut créer des actions ne comportant pas des droits égaux. Dans une telle situation, l'actionnaire est quand même protégé en raison de la règle de common law selon laquelle les droits de l'actionnaire doivent se rattacher à l'action elle-même et non à l'individu. Ainsi, bien que les actions aient des droits différents selon la catégorie particulière à laquelle elles appartiennent, l'actionnaire lui-même ne peut faire l'objet de discrimination. Par exemple, même lorsque différentes catégories d'actions sont créées, les actions faisant partie des diverses catégories elles-mêmes doivent quand même être traitées sur un pied d'égalité. Voici ce que dit à ce sujet Wegenast, dans son ouvrage intitulé *The Law of Canadian Companies* (1979), aux pp. 320 et 321:

> [TRADUCTION] Outre les dispositions, dûment adoptées, prévoyant un ordre préférentiel entre les différentes catégories d'actions et lorsqu'il existe un tel ordre préférentiel parmi les membres de chaque catégorie respective, les actionnaires ont droit d'être traités également. Les actionnaires peuvent avoir des opinions différentes quant à l'opportunité d'une certaine ligne de conduite,

tion amongst the shareholders or, as it is said in some of the cases, "for the benefit of the company as a whole." [Emphasis added.]

More significantly, even when more than one class of shares was created, the directors were not free to discriminate arbitrarily between the classes when awarding a dividend. As Fraser states in *Company Law of Canada* (5th ed. 1962), at p. 532, quoting Lord Cranworth L.C. in *Henry v. Great Northern Ry. Co.* (1857), 1 De G. & J. 606, at p. 638, 44 E.R. 858, at p. 871:

> Where there is more than one class of shareholders "it will be the duty of the directors to fix the amount of the fund retained with reference to the general interest of all classes of shareholders, and not to favour any one class at the expense of the other".

The few Canadian cases that appear to have considered the issue have all held that, even when the shareholders agree to do so, a company may not validly be structured so as to derogate from the common law principle that shareholder rights must attach to the shares themselves. When I speak of shareholder rights, I include at least those three categories of rights that are considered to be fundamental: the right to a dividend, the right to vote, and the right to participate in the distribution of assets upon dissolution of the corporation.

In *Jacobsen v. United Canso Oil & Gas Ltd.* (1980), 113 D.L.R. (3d) 427 (Alta. Q.B.), the defendant company passed a by-law to the effect that no one person was entitled to vote more than 1000 shares, notwithstanding the number of shares actually held by that person. The company had originally been incorporated under the *Companies Act*, R.S.C. 1952, c. 53. The court found the by-law invalid since the *Companies Act* recognized the common law presumption of equality "that all shares confer equal rights and impose equal liabilities and that if voting rights are to vary separate classes of shares must be created so that the different numbers of votes can be attached to the shares themselves and not to the holder" (at p.

mais lorsqu'elle est adoptée, elle doit être appliquée sans distinction entre les actionnaires ou, comme on l'a dit dans certains cas, «à l'avantage de l'ensemble de la société.» [Je souligne.]

Qui plus est, les administrateurs ne sont pas libres de distinguer arbitrairement entre les catégories au moment d'accorder un dividende, même lorsqu'il y a plus d'une catégorie d'actions. Comme le dit Fraser dans *Company Law of Canada* (5e éd. 1962), à la p. 532, citant lord Cranworth dans l'arrêt *Henry v. Great Northern Ry. Co.* (1857), 1 De G. & J. 606, à la p. 638, 44 E.R. 858, à la p. 871:

> [TRADUCTION] Lorsqu'il existe plus d'une catégorie d'actionnaires, «il incombera aux administrateurs de fixer le montant des fonds retenus en tenant compte de l'intérêt général de toutes les catégories d'actionnaires, et de ne pas favoriser l'une ou l'autre catégorie au détriment des autres».

Les quelques arrêts canadiens qui semblent avoir examiné la question ont tous décidé que, même lorsque les actionnaires y consentent, une compagnie ne peut être validement structurée de façon à déroger au principe de la common law selon lequel les droits de l'actionnaire doivent s'attacher aux actions elles-mêmes. Lorsque je parle des droits de l'actionnaire, il s'agit tout au moins de ces trois catégories de droits que je considère fondamentales: le droit de recevoir un dividende, le droit de voter et le droit de participer au partage des actifs au moment de la dissolution de la société.

Dans l'affaire *Jacobsen v. United Canso Oil & Gas Ltd.* (1980), 113 D.L.R. (3d) 427 (B.R. Alb.), la compagnie défenderesse avait adopté un règlement portant que toute personne était limitée, en exerçant son droit de vote, à 1 000 actions, quel que soit le nombre d'actions détenues par cette personne. La compagnie avait initialement été constituée en vertu de la *Loi sur les compagnies*, S.R.C. 1952, ch. 53. La cour a jugé le règlement invalide puisque la *Loi sur les compagnies* reconnaissait la présomption d'égalité prévue par la common law selon laquelle [TRADUCTION] «toutes les actions confèrent des droits égaux et imposent les mêmes obligations, et s'il doit y avoir différents droits de vote, il faut créer des catégories distinctes

433) (emphasis added). The court also held that the by-law was invalid under the *Canada Business Corporations Act*, S.C. 1974-75, c. 33, which superseded the *Companies Act*, the Act upon which the Saskatchewan *Business Corporations Act* is based.

In *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752, the Ontario Court of Appeal held invalid a "step-down" provision contained in the respondent R.L. Crain Inc.'s Articles of Incorporation. The provision provided for a special class of common shares that carried ten votes per share while in the possession of the original shareholder, but that would carry only one vote per share if transferred to another. The Court of Appeal followed the reasoning of McRae J. in the court below, who, at p. 754, held that:

> ... although there was no express prohibition in the *CBCA* against a step-down provision, s. 24(4) of the Act should be interpreted in accordance with the general principles of corporation law with the result that the rights which are attached to a class of shares must be provided equally to all shares of that class, this interpretation being founded on the principle that rights, including votes, attach to the share and not to the shareholder. [Emphasis added.]

Both *Jacobsen* and *Bowater* recognize that the principle that shareholder rights must attach to the corporation's shares is more than a mere contractual right: even the shareholders themselves may not agree to circumvent this principle.

Another case holding that rights attach to the share rather than the shareholder, albeit in a different context, is *Rondeau v. Poirier*, [1980] C.A. 35. In that case, the respondent claimed he was entitled to receive a portion of the cumulative dividends paid on shares that were given by him to his former wife as part of their divorce settlement. The respondent argued that he should receive the dividends that were paid retroactively for the years during which he possessed the shares. This argu-

d'actions de façon que les nombres différents de votes puissent se rattacher aux actions elles-mêmes et non à leur détenteur» (p. 433) (je souligne). La cour a également statué que le règlement était invalide en vertu de la *Loi sur les corporations commerciales canadiennes*, S.C. 1974-75, ch. 33, qui a remplacé la *Loi sur les compagnies*, loi sur laquelle est fondée la *Business Corporations Act* de la Saskatchewan.

Dans l'arrêt *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752, la Cour d'appel de l'Ontario a jugé invalide une disposition «réduisant le nombre de votes» qui figurait dans les statuts constitutifs de l'intimée R.L. Crain Inc. La disposition prévoyait une catégorie spéciale d'actions ordinaires attribuant dix votes par action à l'actionnaire original mais seulement un vote par action à tout détenteur subséquent. La Cour d'appel a suivi le raisonnement du juge McRae du tribunal de première instance qui a déclaré à la p. 754:

> [TRADUCTION] ... bien qu'il n'y ait pas de disposition expresse dans la LCCC interdisant une clause réduisant le nombre de votes, le par. 24(4) de la Loi devrait être interprété conformément aux principes généraux du droit des sociétés de sorte que les droits qui sont rattachés à une catégorie d'actions doivent être accordés également à toutes les actions de cette catégorie, cette interprétation étant fondée sur le principe que les droits, y compris les votes, se rattachent à l'action et non à l'actionnaire. [Je souligne.]

Les deux arrêts *Jacobsen* et *Bowater* reconnaissent que le principe selon lequel les droits de l'actionnaire doivent se rattacher aux actions de la société est plus qu'un simple droit contractuel: les actionnaires eux-mêmes ne peuvent s'entendre pour y faire échec.

L'arrêt *Rondeau c. Poirier*, [1980] C.A. 35 a également statué, dans un contexte différent, que les droits se rattachent à l'action plutôt qu'à l'actionnaire. Dans cette affaire, l'intimé a prétendu qu'il avait le droit de recevoir une partie des dividendes cumulatifs versés sur les actions qu'il avait données à son ex-épouse dans le cadre de leur règlement de divorce. Il a fait valoir qu'il avait droit aux dividendes versés rétroactivement pour les années au cours desquelles il détenait les

ment was rejected by the Court of Appeal, which held that the right to receive dividends is a contingent right that does not actually arise until the dividends have been declared by the corporation. Although the respondent had been the shareholder during the years when most of these dividends were accumulated, any right to these dividends passed with the shares when they were transferred (at p. 39).

Writing for the majority of the Court of Appeal in *Rondeau*, Lamer J., as he then was, noted at p. 37 that the shareholder's right to a dividend encompasses the right to a particular mode of distribution once a dividend has been declared:

> [TRANSLATION] [The shareholder] is entitled not to the profits, since the directors are not obliged to distribute them, but to a portion and to certain modes of distribution of profits if and when the directors decide on a distribution, in other words, declare a dividend. [Emphasis added.]

In my view, a discretionary dividend clause such as the one in this case, that permits the directors of a corporation to choose which class is entitled to receive dividends to the exclusion of the other classes, would be invalid at common law. It contravenes the principle that the directors are not permitted to favour one class at the expense of the others: see Fraser, *supra*, at p. 532. Further, and the respondent does not dispute this point, if dividends are allocated to the different classes on a discretionary basis, then the directors will be making this allocation primarily on the basis of the identity of the shareholders in the various classes. While the respondent contends that this does not represent a significant departure from the existing state of the law, I disagree, for it means, in effect, that the right to the dividend attaches not to the shares, but to the shareholder: see Boivin, "Le droit aux dividendes et le dividende 'discrétionnaire' " (1987), 47 *R. du B.* 73, at p. 92.

Again, in my view, the rule that shareholder rights must attach to the shares themselves is a principle which has its roots in the very nature of the corporate structure. When the Articles of

actions. Cet argument a été rejeté par la Cour d'appel qui a statué que le droit de toucher les dividendes est un droit éventuel qui ne peut être exercé que lorsque la société a déclaré les dividendes. Bien que l'intimé ait été l'actionnaire pendant les années où la grande partie de ces dividendes ont été accumulés, le droit à ces dividendes s'appliquait aux actions lorsque celles-ci ont été transférées (p. 39).

Au nom de la majorité de la Cour d'appel dans l'arrêt *Rondeau*, le juge Lamer (aujourd'hui Juge en chef) a fait remarquer, à la p. 37, que le droit de l'actionnaire à un dividende comprend le droit à un mode particulier de distribution une fois le dividende déclaré:

> [L'actionnaire] a le droit non pas aux profits, puisque les administrateurs ne sont pas obligés de les distribuer, mais à une quotité et à certaines modalités de distribution des profits si et lorsque les administrateurs décident d'une distribution, c'est-à-dire déclarent un dividende. [Je souligne.]

À mon avis, une clause de dividende discrétionnaire comme celle qui existe en l'espèce, qui permet aux administrateurs d'une société de choisir la catégorie qui a le droit de toucher des dividendes à l'exclusion des autres catégories, serait nulle sous le régime de la common law. Elle va à l'encontre du principe selon lequel les administrateurs ne peuvent favoriser une catégorie au détriment des autres: voir Fraser, précité, à la p. 532. En outre, et l'intimé ne conteste pas ce point, si les dividendes sont distribués aux différentes catégories sur une base discrétionnaire, les administrateurs feront alors cette distribution en se fondant essentiellement sur l'identité des actionnaires dans les différentes catégories. L'intimé soutient qu'il ne s'agit pas là d'une dérogation importante au droit actuel, mais je ne suis pas d'accord, car cela signifie en fait que le droit aux dividendes se rattache non pas aux actions mais à l'actionnaire: voir Boivin, «Le droit aux dividendes et le dividende «discrétionnaire»» (1987), 47 *R. du B.* 73, à la p. 92.

Je répète que la règle selon laquelle les droits de l'actionnaire doivent s'attacher aux actions elles-mêmes est un principe qui prend racine dans la nature même de la structure de la société. Lorsque

Incorporation create classes of shares that have different rights, this normally does not require the directors to discriminate between the shareholders—the mode of distribution is set out in the shares themselves. To allow discrimination on the basis of the identity of those possessing the shares ignores the separation that is supposed to exist between the corporation and its shareholders: see Martel and Martel, *La compagnie au Québec, Les aspects juridiques* (1987), vol. I, at p. 18-14B.

The respondent, however, contends that, even in a situation where no discretionary dividend clause exists, in a corporation with at least one class of preferred share, the directors of a corporation effectively have the power to choose which classes will receive dividends. They can do so by declaring dividends in an amount small enough that only the preferred shares will partake. This, however, is a discretion that is expressly limited by the terms of the Articles of Incorporation. The need for protection is not as great, for the common shareholder is not placed in a position where the director can award dividends of any amount to a class other than his or her own. That shareholder knows that if dividends are declared in excess of a specified amount, then his or her class of shares will participate. If dividends are never declared in excess of that amount, then at least the money is retained by the corporation. Where there is a discretionary dividend clause, however, the shareholder is completely dependent on the goodwill of the directors. The minority shareholder is placed in a near impossible position if this goodwill turns against him or her; see Martel and Martel, *supra*, at p. 18-14A. It is interesting to note that at least one commentator who writes in favour of the discretionary dividend clause suggests that each shareholder's "informed" consent to this sort of arrangement be obtained in advance in writing, presumably to guard against just such an eventuality: see Quessy, "Les aspects corporatifs et fiscaux des actions à dividende discrétionnaire", [1985] 7 *R.P.F.S.* 31, at pp. 42-43.

les statuts constitutifs créent des catégories d'actions qui comportent des droits différents, cela n'oblige normalement pas les administrateurs à établir une distinction entre les actionnaires—le mode de distribution est prévu dans les actions elles-mêmes. Permettre une distinction fondée sur l'identité des personnes qui possèdent les actions, c'est ne pas tenir compte de la séparation qui est censée exister entre la société et ses actionnaires: voir l'ouvrage de Martel et Martel, *La compagnie au Québec, Les aspects juridiques* (1987), vol. I, à la p. 18-14B.

L'intimé prétend cependant que même en l'absence de toute clause de dividende discrétionnaire, les administrateurs d'une société qui comporte au moins une catégorie d'actions privilégiées, ont effectivement le pouvoir de déterminer quelles catégories recevront des dividendes. Ils peuvent le faire en déclarant des dividendes dont le montant est suffisamment petit pour que seules les actions privilégiées y aient droit. C'est là, toutefois, un pouvoir discrétionnaire qui est expressément limité par les dispositions des statuts constitutifs. Le besoin de protection n'est pas aussi grand, car l'actionnaire ordinaire n'est pas placé dans une position où un administrateur peut accorder quelques dividendes que ce soit à une catégorie autre que la sienne. Cet actionnaire sait que si les dividendes déclarés excèdent un montant spécifique, sa catégorie d'actions participera alors au partage desdits dividendes. Si les dividendes déclarés ne dépassent jamais ce montant, la société retient alors tout au moins l'argent. Mais lorsqu'il y a une clause de dividende discrétionnaire, l'actionnaire dépend entièrement du bon vouloir des administrateurs. L'actionnaire minoritaire est placé dans une situation presque impossible si ce bon vouloir joue contre lui; voir Martel et Martel, précité, à la p. 18-14A. Il est intéressant de souligner qu'au moins un commentateur favorable à la clause de dividende discrétionnaire laisse entendre qu'il faudrait obtenir à l'avance le consentement «éclairé» par écrit de chaque actionnaire à cette sorte d'arrangement, vraisemblablement par précaution contre une telle éventualité: voir l'ouvrage de Quessy, «Les aspects corporatifs et fiscaux des actions à dividende discrétionnaire», [1985] 7 *R.P.F.S.* 31, aux pp. 42 et 43.

In my opinion, a second reason why the discretionary dividend clause is invalid at common law is because it places the director in a position where he cannot fulfill his fiduciary obligations to the corporation as a whole. The interests of different classes of shareholders, where a discretionary declaration of dividends is concerned, are necessarily divergent, since a dividend will be declared for the benefit of one class of shareholders at the expense of the others. As put by Martel and Martel, *supra*, at pp. 18-14 and 18-14A:

[TRANSLATION] It would be impossible for him to justify this preference, since it is surely not made in good faith in the interests of the company. In using their discretion to favour certain shareholders, the directors are in an obvious conflict of interest, particularly if they are themselves those shareholders or associated with them . . . . The situation created by discretionary dividend clauses is unprecedented, and places the directors in an impossible position: if they favour certain shareholders by departing from the rule of equality, they are breaching their obligations as agents or quasi-fiduciaries of the company, and in fact are acting as agents of the shareholders they are favouring, or at least of those who control the company.

The conflict of interest is heightened when the director happens to be a shareholder himself. When the discretionary dividend clause is utilized to award dividends to a class in which the director holds shares, or from which he derives some personal benefit, the situation can be compared to the usurpation of a corporate opportunity properly belonging to the company. As Laskin J. observed in the *Canadian Aero Service Ltd. v. O'Malley*, *supra*, at pp. 606-607, the fiduciary duty, at the very least, precludes the director

. . . from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

A discretionary dividend clause gives the director a licence to secure, by virtue of his position, a

À mon avis, une deuxième raison pour laquelle la clause de dividende discrétionnaire est invalide en common law est qu'elle place l'administrateur dans une position où il ne peut remplir ses obligations de fiduciaire envers la société dans son ensemble. Les intérêts des différentes catégories d'actionnaires, lorsqu'il y a une déclaration de dividendes discrétionnaire, sont nécessairement divergents, puisqu'un dividende sera déclaré au bénéfice d'une catégorie d'actionnaires et aux dépens des autres. Comme il est dit dans Martel et Martel, précité, aux pp. 18-14 et 18-14A:

Il lui serait impossible de justifier cette préférence, car elle n'est sûrement pas faite de bonne foi dans l'intérêt de la compagnie. En utilisant la discrétion qui leur est conférée pour avantager certains actionnaires, les administrateurs sont en conflit d'intérêt manifeste, particulièrement s'ils sont eux-mêmes ces actionnaires ou liés à eux [. . .] La situation créée par les clauses de dividende discrétionnaire est sans précédent, et place les administrateurs dans une position impossible: s'ils avantagent certains actionnaires en dérogeant à la règle de l'égalité, ils contreviennent à leurs obligations de mandataires ou quasi-fiduciaires de la compagnie, et agissent en réalité comme mandataires des actionnaires qu'ils favorisent, ou du moins de ceux qui contrôlent la compagnie.

Le conflit d'intérêts est encore plus évident lorsqu'un administrateur est lui-même un actionnaire. Lorsqu'il y a recours à la clause du dividende discrétionnaire pour allouer des dividendes à une catégorie dans laquelle un administrateur détient des actions, ou d'où il tire un avantage personnel, la situation peut se comparer à l'usurpation d'un privilège de la société qui appartient régulièrement à cette dernière. Comme l'a fait remarquer le juge Laskin dans l'arrêt *Canadian Aero Service Ltd. c. O'Malley*, précité, aux pp. 606 et 607, l'obligation de fiduciaire empêche pour le moins un administrateur

. . . [de] s'approprier, en secret ou sans l'approbation de la compagnie (approbation qui doit être régulièrement accordée à la lumière de tous les faits) un bien ou avantage commercial qui appartient à celle-ci ou qu'elle a négocié; surtout si l'administrateur ou le fonctionnaire participe aux négociations au nom de la compagnie.

Une clause de dividende discrétionnaire permet à l'administrateur d'obtenir, grâce à sa position, un

personal benefit at the expense of the corporation and its shareholders without having to seek shareholder approval. By contrast, requiring the mode of distribution to be expressly set out in the Articles of Incorporation, which can only be amended by approval of the shareholders, is consistent with the fiduciary obligation as described in the *Canadian Aero* case. I note that, in the usual case, if the directors themselves hold preferred shares, this does not present a problem, for the common shareholders will have agreed to subordinate their dividend interest to the preferred class of shares based upon "full disclosure" of the maximum amount to which these preferred shares will enjoy priority. With a discretionary dividend clause, there is no such disclosure, since the amount and priority is left to be determined in the future, wholly at the directors' discretion.

The Chief Justice states that the fact that the directors take into account the identity of shareholders when declaring a dividend does not necessarily create a conflict of duty. As an example, he suggests that the directors could validly exercise their discretion to allocate dividends so as to reward a group of employees who comprise a class of preferred shareholders. With respect, it seems to me that even this would constitute an improper exercise of the discretionary dividend power. If the employees truly merit some additional reward, the proper course would be to achieve this through some other form of compensation, for example a bonus. A dividend is supposed to be a return on an investment. On this point, I adopt the words of Desjardins J. of the Federal Court of Appeal ([1988] 2 F.C. 356), at p. 370:

> But surely, there is no relationship, in company law, between the work and services a shareholder brings to a company and his or her entitlement to a dividend if declared. The dividends come as a return on his or her investment and not on account of work and services he or she may render to the company. The dividend attaches to the share and not to the shareholder.

avantage personnel au détriment de la société et de ses actionnaires sans avoir à demander l'approbation de ces derniers. Par contraste, exiger que le mode de distribution soit expressément énoncé dans les statuts constitutifs, lesquels ne peuvent être modifiés qu'avec l'approbation des actionnaires, est conforme à l'obligation de fiduciaire décrite dans l'arrêt *Canadian Aero*. Je souligne que si les administrateurs eux-mêmes détiennent des actions privilégiées, cela ne pose pas habituellement de problème, car les actionnaires ordinaires se seront entendus pour subordonner leur droit aux dividendes à la catégorie d'actions privilégiées en se fondant sur la «divulgation intégrale» du montant maximum jusqu'à concurrence duquel ces actions privilégiées auront priorité. Lorsqu'il y a une clause de dividende discrétionnaire, cette divulgation n'existe pas puisque le montant et la priorité en question seront déterminés subséquemment, à l'entière discrétion des administrateurs.

Le Juge en chef affirme que le fait que les administrateurs prennent en considération l'identité des actionnaires lorsqu'ils déclarent un dividende ne crée pas nécessairement un conflit d'intérêts. À titre d'exemple, il laisse entendre que des administrateurs pourraient validement exercer leur pouvoir discrétionnaire d'accorder des dividendes en vue de récompenser un groupe d'employés qui comprend une catégorie d'actionnaires privilégiés. Sauf le respect que je lui dois, il me semble que même cela constituerait un exercice abusif du pouvoir d'accorder un dividende discrétionnaire. Si les employés méritent vraiment une récompense additionnelle, la bonne façon de procéder serait de leur accorder une autre forme de compensation comme, par exemple, une prime. Un dividende est censé représenter le rapport d'un investissement. Sur ce point, je souscris aux propos du juge Desjardins de la Cour d'appel fédérale ([1988] 2 C.F. 356), à la p. 370:

> Mais assurément, il n'existe aucun rapport, en droit des compagnies, entre le travail et les services effectués par un actionnaire pour la société et son droit à un dividende, s'il est déclaré. Les dividendes représentent le rapport d'un investissement et non la contrepartie du travail ou des services qu'un actionnaire peut fournir à la société. Les dividendes se rattachent à l'action et non à l'actionnaire.

In any event, even if I did not find that the discretionary dividend clause was itself invalid under the common law, I would find that the clause, at least as designed in the present case, is insufficient to rebut the common law presumption of equality. As earlier noted, it is well accepted that in the absence of some differentiation between the shares, all shares must be treated equally: see *Birch v. Cropper, In re Bridgewater Navigation Co.* (1889), 14 A.C. 525 (H.L.). The respondent contends that the fact that the classes of shares have the potential to receive dividends in potentially different amounts is sufficient to differentiate them. The fact remains, however, that all three classes of Northland Trucks' shares are defined in substantially the same manner with respect to their entitlement to dividends. Each class carries "the distinction and right to receive dividends exclusive of other classes of shares in the said corporation". As Professor Boivin, *supra*, notes, at p. 94:

> [TRANSLATION] . . . if all the shares have a discretionary dividend clause, they are all on an equal footing as regards dividends, even if there are certain distinctive characteristics with respect to other rights or privileges. Far from breaching the principle of equality, the clause thus used confirms it.

Any difference between the shares concerning their right to receive dividends that does exist clearly does not derive from any differentiation between the shares, but would have to stem from the actions of the directors of the corporation. This would, however, be a right that does not derive from the share itself, and as such would be invalid at common law.

Having found that the discretionary dividend clause contained in the Articles of Incorporation of Northland Trucks was an invalid allocation of power at common law, it remains to examine the Saskatchewan *Business Corporations Act* to see if the statute changes this result.

The Saskatchewan Business Corporations Act

Section 24(4)(*a*) of the Saskatchewan *Business Corporations Act* provides that the corporation

Quoi qu'il en soit, même si je n'arrivais pas à la conclusion que la clause de dividende discrétionnaire est en soi invalide sous le régime de la common law, je statuerais que cette clause, telle qu'elle est libellée en l'espèce, ne suffit pas à réfuter la présomption d'égalité de la common law. Comme je l'ai déjà fait remarquer, il est reconnu qu'en l'absence d'une quelconque différenciation entre les actions, celles-ci doivent toutes être traitées également: voir *Birch v. Cropper, In re Bridgewater Navigation Co.* (1889), 14 A.C. 525 (H.L.). L'intimé soutient que le fait que les catégories d'actions ont la possibilité de recevoir des dividendes dont les montants peuvent différer suffit à les différencier. Le fait demeure toutefois que les trois catégories d'actions de Northland Trucks sont définies essentiellement de la même façon en ce qui concerne leur droit aux dividendes. Chaque catégorie accorde «le droit distinctif de recevoir des dividendes à l'exclusion des autres catégories d'actions dans ladite société». Comme le professeur Boivin, précité, le fait remarquer à la p. 94:

> . . . si toutes les actions sont assorties d'une clause de dividende discrétionnaire, elles sont toutes sur un pied d'égalité en matière de dividendes, même si certaines particularités existent quant à d'autres droits ou privilèges. Loin de rompre le principe d'égalité, la clause ainsi employée le confirme.

Toute différence qui existe entre les actions à l'égard de leur droit de recevoir des dividendes découle clairement non pas d'une différenciation entre les actions mais plutôt des actes des administrateurs de la société. Il s'agirait toutefois d'un droit qui ne découle pas de l'action elle-même et comme tel, il serait invalide en common law.

Après avoir conclu que la clause de dividende discrétionnaire contenue dans les statuts constitutifs de Northland Trucks était une attribution de pouvoir nulle en common law, il me reste à examiner la *Business Corporations Act* de la Saskatchewan pour voir si elle modifie cette situation.

La Business Corporations Act de la Saskatchewan

L'alinéa 24(4)*a*) de la *Business Corporations Act* de la Saskatchewan prévoit qu'une société

may derogate from the common law rule of equality, by creating more than one class of shares:

24. . . .

(4) The articles may provide for more than one class of shares and, if they so provide:

(*a*) the rights, privileges, restrictions and conditions attaching to the shares of each class shall be set out therein; . . .

See also s. 6(1)(*c*)(i).

The question becomes whether the allocation of power to the directors of a corporation to determine each class of shares' right to a dividend, once one has been declared, is consistent with s. 24(4)(*a*), which provides that such rights must be "set out" in the Articles of Incorporation. There are two possible interpretations. The first is that it is sufficient if the articles "set out" that the different classes of shares have the "right" to receive a dividend that has been declared, wholly at the discretion of the directors. The second is that the requirement that the rights be "set out" requires that the mode of distribution of the dividends be expressly provided for in the articles themselves.

I start from the premise that s. 24(4)(*a*) must, of course, be interpreted in accordance with the principles of the common law: see *Bowater*, *supra*, at p. 754. It should be apparent from the preceding analysis that, in my opinion, this would inevitably lead one towards the second interpretation, since, at common law, shareholder rights had to be expressly provided for in the shares themselves. If the Saskatchewan legislature intended to depart from this principle, it could have stated so explicitly. In my view, s. 24(4)(*a*) falls far short of providing the clear expression necessary to indicate an intent to provide the directors of a corporation with a power which they did not otherwise have at common law.

I note that this interpretation of s. 24(4)(*a*) appears to be the most consistent with other provisions of the Act as well. For example, s. 27 provides for the possibility of creating different "series" within a class of shares, which may themselves be structured so as to possess different rights. In contrast to its treatment of classes of

peut déroger à la règle de l'égalité en common law en créant plus d'une catégorie d'actions:

[TRADUCTION] **24.** . . .

(4) L'acte constitutif peut prévoir plusieurs catégories d'actions, auquel cas:

a) les droits, privilèges, restrictions et conditions qui se rattachent aux actions de chaque catégorie doivent y être énoncés; . . .

Voir également le sous-al. 6(1)*c*)(i).

La question est maintenant de savoir si le pouvoir attribué aux administrateurs d'une société de déterminer le droit de chaque catégorie d'actions à un dividende, une fois celui-ci déclaré, est conforme à l'al. 24(4)*a*) qui prescrit que ces droits doivent être «énoncés» dans les statuts constitutifs. Il y a deux interprétations possibles. Selon la première, il suffit que les statuts «énoncent» que les différentes catégories d'actions ont le «droit» de recevoir un dividende qui a été déclaré, à l'entière discrétion des administrateurs. Selon la seconde interprétation, l'obligation d'«énoncer» les droits en cause exige que le mode de distribution des dividendes soit expressément prévu dans les statuts eux-mêmes.

Je pars de la prémisse selon laquelle l'al. 24(4)*a*) doit bien sûr être interprété conformément aux principes de la common law: voir *Bowater*, précité, à la p. 754. À mon avis, il devrait ressortir de l'analyse précédente que cela nous amènerait inévitablement à la seconde interprétation puisque, en common law, les droits de l'actionnaire doivent être expressément prévus dans les actions elles-mêmes. Si la législature de la Saskatchewan entendait déroger à ce principe, elle aurait pu le dire explicitement. À mon avis, l'al. 24(4)*a*) est très loin d'exprimer clairement l'intention de conférer aux administrateurs d'une société un pouvoir qu'ils n'avaient pas par ailleurs en vertu de la common law.

Je note que cette interprétation de l'al. 24(4)*a*) semble également être la plus conforme aux autres dispositions de la Loi. Par exemple, l'art. 27 prévoit la possibilité de créer différentes «séries» à l'intérieur d'une catégorie d'actions, qui peuvent elles-mêmes être structurées de façon à posséder différents droits. Contrairement à la façon dont

shares, the Act expressly provides that the directors of a corporation may be given the discretion to determine the rights attaching to these series. Section 27(1) reads:

> **27.**—(1) The articles may authorize the issue of any class of shares in one or more series and may authorize the directors to fix the number of shares in and to determine the designation, rights, privileges, restrictions and conditions attaching to the shares of each series, subject to the limitations set out in the articles.

It is significant that, even when the Act specifically provides that the directors may be given the discretion to determine the rights to be assigned to a series, this discretion is not unlimited: see s. 27(2), (3), (4). In particular, the directors may not assign to a series a higher priority in respect of dividends or return of capital over any other series of the class that are still outstanding (s. 27(3)). Thus, even though under the Act the shareholders can give the directors the power to issue series within a class and assign rights to those series, the shareholders may not agree to give the directors the discretion to interfere with their right to dividends or a return of capital by choosing to give another series priority. Why would the legislature find it necessary to protect the shareholders by restricting the directors' discretion in this manner? In my view, the answer lies in the fact that the rights assigned to series, unlike classes of shares, may be altered without amending the corporate constitution. As Professor Welling, *supra*, notes, at p. 584, this distinction leads to a potential for abuse of power by the directors:

> The result is clear although, from the point of view of shareholder protection, it is initially astounding. The statute requires that discrimination between different classes be strictly regulated by the corporate constitution, subject to the remedies protecting adherence to the corporate constitution and changeable only by the usual shareholder approvals. Strangely, discrimination *within a particular class* need only be pre-meditated in the

elle traite les catégories d'actions, la Loi prévoit expressément qu'on peut accorder aux administrateurs d'une société le pouvoir discrétionnaire de déterminer les droits se rattachant à ces séries. Le paragraphe 27(1) dispose:

> [TRADUCTION] **27.** (1) Les statuts peuvent autoriser l'émission de toute catégorie d'actions dans une ou plusieurs séries et permettre aux administrateurs de fixer le nombre d'actions dans chacune d'elles, et de déterminer la désignation, les droits, les privilèges, les restrictions et les conditions se rattachant aux actions de chaque série, sous réserve des limites énoncées dans les statuts.

Il est important de remarquer que, même lorsque la Loi prévoit expressément qu'on peut conférer aux administrateurs le pouvoir discrétionnaire de déterminer les droits à être assignés à une série, ce pouvoir discrétionnaire n'est pas illimité: voir les par. 27(2) à (4). En particulier, les administrateurs ne peuvent privilégier une série à l'égard des dividendes ou du remboursement de capital au détriment de toute autre série de la même catégorie qui est encore en circulation (par. 27(3)). Ainsi, même si en vertu de la Loi, les actionnaires peuvent accorder aux administrateurs le pouvoir d'émettre des séries dans une catégorie donnée et conférer des droits à ces séries, ils ne peuvent s'entendre pour accorder aux administrateurs le pouvoir discrétionnaire de porter atteinte à leur droit aux dividendes ou à un remboursement de capital en choisissant de donner priorité à une autre série. Pourquoi la législature jugerait-elle nécessaire de protéger les actionnaires en restreignant le pouvoir discrétionnaire des administrateurs de cette façon? Je répondrai que les droits conférés aux séries, contrairement aux catégories d'actions, peuvent être changés sans qu'on modifie la constitution de la société. Comme le fait remarquer le professeur Welling, précité, à la p. 584, cette distinction peut entraîner un abus de pouvoir de la part des administrateurs:

> [TRADUCTION] Le résultat est clair même si, du point de vue de la protection de l'actionnaire, il est à première vue surprenant. La loi exige que toute distinction faite entre les différentes catégories soit strictement réglementée par la constitution de la société, sous réserve des recours protégeant l'observation de cette constitution, et que cette distinction ne puisse être modifiée qu'avec l'approbation habituelle des actionnaires. Curieusement,

articles: the details can be supplied from time to time by ordinary directors' resolutions, without any shareholder participation at all. [Emphasis in original.]

Because s. 27 allows the shareholders to give directors the power to discriminate between series of shares, while leaving the directors with the ability to "supply the details" of this discrimination themselves at a later date, the legislature apparently found it necessary to limit this power, by preventing the directors from discriminating in certain areas, specifically with respect to priority over dividends. This attempt at protection would be rendered futile if it were permissible for shareholders to give to directors the same power to discriminate with respect to priority over dividends where shareholder classes are concerned, through the use of a discretionary dividend clause.

A more reasonable interpretation of the statute is that it contemplates that shareholders will be protected from changes being made to the rights attached to different classes of shares by virtue of the fact that such rights may only be amended by altering the corporate constitution. Section 170(1)(*c*) of the Saskatchewan *Business Corporations Act* provides that:

> **170**(1) ... the holders of shares of a class or ... of a series are entitled to vote separately as a class or series upon a proposal to amend the articles to:
>
> . . .
>
> (*c*) add, change or remove the rights, privileges, restrictions or conditions attached to the shares of such class ....

The protection afforded by s. 170 for dividend rights can only be meaningful if the mode of distribution must itself be set out in the Articles of Incorporation. Otherwise, the section can effectively be circumvented because the directors will have the power to change each class's allocation of dividends at will, without the need for a shareholder vote. The importance of s. 170(1) as a mechanism for protecting shareholder interests is evidenced by the fact that each class of shares is

il suffit que la distinction *au sein d'une catégorie particulière* soit prévue dans les statuts: les détails peuvent être fournis à l'occasion par les résolutions ordinaires des administrateurs, sans participation aucune des actionnaires. [Souligné dans le texte original.]

Parce que l'art. 27 permet aux actionnaires d'accorder aux administrateurs le pouvoir d'établir une distinction entre les séries d'actions, tout en autorisant les administrateurs à «fournir eux-mêmes les détails» de cette distinction à une date ultérieure, la législature a apparemment jugé nécessaire de limiter ce pouvoir, en empêchant les administrateurs d'établir une distinction dans certains domaines, particulièrement en ce qui concerne la priorité sur les dividendes. Cette tentative de protection serait futile s'il était loisible aux actionnaires d'accorder aux administrateurs le même pouvoir d'établir une distinction à l'égard de la priorité sur les dividendes en ce qui concerne les catégories d'actionnaires, en ayant recours à une clause de dividende discrétionnaire.

Selon une interprétation plus raisonnable de la loi, celle-ci prévoit que les actionnaires seront protégés contre les modifications apportées aux droits se rattachant aux différentes catégories d'actions étant donné que ces droits ne peuvent être changés que par la modification de la constitution de la société. L'alinéa 170(1)*c*) de la *Business Corporations Act* de la Saskatchewan dispose:

> [TRADUCTION] **170**(1) ... les détenteurs d'actions d'une catégorie ou [...] d'une série sont autorisés à voter séparément à ce titre concernant un projet de modification des statuts en vue:
>
> . . .
>
> *c*) d'ajouter, de modifier ou de supprimer les droits, privilèges, restrictions ou conditions se rattachant aux actions de cette catégorie ...

La protection assurée par l'art. 170 quant aux droits à un dividende ne peut avoir un sens que si le mode de distribution doit lui-même être énoncé dans les statuts constitutifs. Sinon, on peut efficacement contourner cet article car les administrateurs pourront à volonté changer la distribution des dividendes de chaque catégorie, sans devoir obtenir le vote des actionnaires. L'importance du par. 170(1) comme moyen de protéger les intérêts de l'actionnaire est démontrée par le fait que

entitled to vote, regardless of whether the shares normally carry this right or not (s. 170(3)).

I also find the use of the discretionary dividend clause in the present case to be inconsistent with the requirement of the Act that at least one class of shares must be entitled "to receive any dividend declared by the corporation" (s. 24(3)(*b*)). On this point, I agree with the following remarks of Professor Boivin, *supra*, at p. 93:

[TRANSLATION] Assuming that the capital consists of a single class of shares and that these shares carry a discretionary dividend, they do not confer, in our view, any right to any dividends, which is not surprising since that is precisely the aim. Even assuming that the share confers a right to a dividend, that right cannot be interpreted as a right to receive "any dividend declared".

In essence, the argument of the respondent distills down to a single point: the Saskatchewan *Business Corporations Act* does not appear to specifically prohibit the use of a discretionary dividend clause, and in the absence of such explicit prohibition, the parties must be left free to contract at will. If one were to carry this argument to its logical conclusion, there would be nothing to prevent shareholders from passing a "discretionary voting" clause, giving the directors the power to exercise all of their votes as they see fit. Indeed, during the oral argument, counsel for the respondent appeared to suggest that this, too, would be a permissible allocation of power. I find that such an arrangement, which would leave the directors in complete control of the corporation, with the power to prolong their tenure indefinitely, to be completely unacceptable in that it would undermine virtually all of the protection afforded to shareholders by the Act.

It is true, of course, that the actions of the directors will always be subject to the qualification that they are acting as fiduciaries for the corporation. Thus, in theory, it is always open for a shareholder to bring a suit if he feels the directors are exercising their discretion improperly. In reality, however, one cannot overlook the significant

chaque catégorie d'actions bénéficie du droit de vote, peu importe que les actions confèrent normalement ou non ce droit (par. 170(3)).

Je conclus également que le recours à la clause de dividende discrétionnaire en l'espèce est incompatible avec l'exigence de la Loi selon laquelle au moins une catégorie d'actions doit avoir le droit [TRADUCTION] «de recevoir tout dividende déclaré par la société» (al. 24(3)*b*)). Sur ce point, je souscris aux remarques suivantes du professeur Boivin, à la p. 93:

Dans l'hypothèse où le capital comporte une seule catégorie d'actions et que ces actions sont assorties d'un dividende discrétionnaire, elles ne confèrent, à notre avis, aucun droit à un dividende quelconque, ce qui n'a rien d'étonnant puisque c'est précisément là l'objectif visé. Même en supposant que l'action confère un droit à un dividende, ce droit ne peut s'interpréter comme celui de recevoir «tout dividende déclaré».

Au fond, l'argument de l'intimé se résume à un seul point: la *Business Corporations Act* de la Saskatchewan ne semble pas interdire expressément l'utilisation d'une clause de dividende discrétionnaire et en l'absence d'une telle interdiction expresse, il doit être loisible aux parties de contracter selon leur bon vouloir. Il faudrait logiquement conclure de cet argument que rien n'empêcherait les actionnaires d'adopter une clause «de vote discrétionnaire» qui accorderait aux administrateurs le pouvoir d'exercer tous leurs votes comme bon leur semble. En fait, l'avocat de l'intimé a semblé laisser entendre durant sa plaidoirie que cela aussi constituerait une attribution de pouvoir permise. Je conclus qu'un tel arrangement qui laisserait aux administrateurs le contrôle absolu de la société et leur permettrait de prolonger leur mandat indéfiniment, est tout à fait inacceptable dans la mesure où il supprimerait virtuellement toute la protection accordée aux actionnaires par la Loi.

Il est vrai bien sûr que les administrateurs seront toujours assujettis à l'obligation d'agir à titre de fiduciaire de la société. Ainsi, en théorie, il est toujours loisible à un actionnaire d'intenter une poursuite s'il estime que les administrateurs exercent leur pouvoir discrétionnaire d'une façon inappropriée. En réalité, cependant, on ne saurait ne

burden and expense that this remedy entails. In my view, placing the onus on shareholders to bring a suit to vindicate their rights is an inadequate means of protecting them from the potential for abuse created by the presence of a discretionary dividend clause.

If this protectionist view seems somewhat patronizing, I would point out that other provisions of the Saskatchewan *Business Corporations Act* provide, in a similar manner, for the protection of shareholders from arrangements to which they might otherwise agree. One example already referred to is s. 27, which restricts the power that can validly be allocated to directors to determine the rights and privileges of future series of shares. I also note that the protection of the individual shareholder was one of the major driving forces behind the extensive statutory reform that took place in Canadian corporate law in the 1970s; see Welling, *supra*, at p. 502. The Saskatchewan *Business Corporations Act* is a product of that reform, as is the *Canada Business Corporations Act* upon which the Saskatchewan *Business Corporations Act* is modeled. Corporate law has not yet evolved to the point where the freedom to contract at any cost has become paramount to all other concerns.

The need for shareholder protection from abuse of the discretionary dividend clause becomes all the more apparent when one considers the possibility that such a clause could be inserted in the Articles of Incorporation of a large, publicly held corporation. I recognize that in this case we are dealing with a closely held corporation, where there has been no allegation of a breach of fiduciary duty by the directors, but the Saskatchewan *Business Corporations Act* applies to large and small corporations equally. One rule of law must stand for both. I hasten to add that, in my view, the primary reason that the discretionary dividend clause is invalid is that it offends the principle that the corporation has a separate legal existence from the shareholder. Since the shareholders of closely held corporations are given preferential treatment, such as limited liability, based upon the notion of

pas tenir compte du fardeau et des frais importants que ce recours entraîne. À mon avis, imposer aux actionnaires le fardeau d'intenter une poursuite pour faire valoir leurs droits n'est pas un moyen adéquat pour les protéger contre les abus auxquels la clause de dividende discrétionnaire peut donner lieu.

Si ce point de vue protectionniste semble quelque peu condescendant, je ferai remarquer que d'autres dispositions de la *Business Corporations Act* de la Saskatchewan protègent, de la même façon, les actionnaires contre des arrangements auxquels ils pourraient autrement consentir. Un exemple déjà mentionné est l'art. 27, qui restreint le pouvoir qui peut être validement conféré aux administrateurs de déterminer les droits et privilèges des futures séries d'actions. Je souligne également que la protection de l'actionnaire en tant que particulier a été l'une des forces dominantes qui a inspiré la réforme législative en profondeur du droit des sociétés au Canada au cours des années 70; voir Welling, précité, à la p. 502. La *Business Corporations Act* de la Saskatchewan est un résultat de cette réforme, tout comme la *Loi sur les corporations commerciales canadiennes* sur laquelle elle est modelée. Le droit des sociétés n'en est pas encore rendu au point où la liberté de contracter à tout prix a préséance sur toutes autres considérations.

La nécessité de protéger l'actionnaire contre l'usage abusif de la clause de dividende discrétionnaire devient encore plus manifeste lorsqu'on envisage la possibilité d'insérer une telle clause dans les statuts constitutifs d'une société dont les actions sont détenues par le public. Je reconnais qu'en l'espèce, il s'agit d'une société fermée, et qu'il n'a pas été allégué que les administrateurs avaient manqué à leur obligation de fiduciaire, mais la *Business Corporations Act* de la Saskatchewan s'applique aussi bien aux grandes qu'aux petites sociétés. Il doit y avoir une seule règle de droit pour les deux. Je m'empresse d'ajouter qu'à mon avis, la raison principale pour laquelle la clause de dividende discrétionnaire est nulle est qu'elle va à l'encontre du principe selon lequel la société constitue une entité juridique distincte de celle de l'actionnaire. Puisque les actionnaires des

this separation between corporation and shareholder, it is not unreasonable for the state to require them to respect this separation by structuring their corporation accordingly.

Against the weight of these arguments, I can think of no socially useful purpose, and counsel for the respondent could point to none, behind the employment of a discretionary dividend clause. The only apparent purpose of such a clause is to facilitate tax avoidance through "income-splitting", which does little to persuade me of the need to allow corporations to be structured in this manner: see Boivin, *supra*, at p. 106; see also comment, "The Last Bastion for Income-Splitting? *J. A. McClurg v. The Queen*" (1986), 34 *Can. Tax J.* 404.

Having found that the discretionary dividend clause used in the Articles of Incorporation of Northland Trucks was invalid, it remains to determine how the money distributed pursuant to that clause should be allocated. Since the directors of Northland Trucks must be taken to have made the decision that the declaration of the amount of dividends that were distributed was in the best interests of the corporation, it would be inappropriate to now return this money to the corporation. The proper solution, in my view, is to redistribute the dividends amongst the various classes of shares. As previously discussed, in the absence of a valid differentiation between the shares to the contrary, all of the classes will share in the dividend equally. In the present case, that means that the money will be allocated equally to the shares in classes A, B, and C.

I turn then to a consideration of the income tax consequences of the dividend payments.

Income Tax Consequences

General

I am in agreement with the Chief Justice as to the proper approach to the interpretation of the *Income Tax Act* generally, and s. 56(2) specifically, as well as the necessity of ascertaining the true

sociétés fermées jouissent d'un traitement privilégié, tel que la responsabilité limitée, compte tenu de cette séparation entre la société et l'actionnaire, il est normal que l'État les oblige à respecter la séparation en cause en structurant leur société en conséquence.

Pour faire contrepoids à ces arguments, je ne perçois aucune raison utile, sur le plan social—et l'avocat de l'intimé n'a su en mentionner aucune—qui justifierait l'utilisation d'une clause de dividende discrétionnaire. Le seul but apparent d'une telle clause est de faciliter l'évitement fiscal grâce au «fractionnement du revenu», ce qui ne saurait me convaincre de la nécessité de permettre aux sociétés d'être structurées de cette manière: voir Boivin, précité, à la p. 106; voir également les commentaires sur l'arrêt «The Last Bastion for Income-Splitting? *J. A. McClurg v. The Queen*» (1986), 34 *Can. Tax J.* 404.

Après avoir conclu que la clause de dividende discrétionnaire utilisée dans les statuts constitutifs de Northland Trucks était invalide, il reste à déterminer comment l'argent distribué en vertu de cette clause devrait être alloué. Puisqu'il faut présumer que les administrateurs de Northland Trucks ont décidé que la déclaration du montant des dividendes distribués était dans l'intérêt de la société, il serait maintenant inapproprié de retourner cet argent à la société. Il conviendrait à mon avis de redistribuer les dividendes parmi les différentes catégories d'actions. Comme je l'ai déjà dit, en l'absence d'une différenciation valide entre les actions à l'effet contraire, toutes les catégories se partageront les dividendes également. En l'espèce, cela signifie que l'argent sera distribué également aux actions des catégories A, B et C.

Je vais maintenant examiner les conséquences d'ordre fiscal des versements de dividende.

Conséquences d'ordre fiscal

Généralités

Je suis d'accord avec le Juge en chef quant à la bonne façon d'interpréter la *Loi de l'impôt sur le revenu* en général, et le par. 56(2) en particulier, ainsi que sur la nécessité de déterminer la nature

nature of the transaction in question. With deference, however, I am unable to agree with him as to the application of s. 56(2) in the present case. Our differences arise as a result of the interdependence of the corporate law and income taxation issues in this case, and my finding that the discretionary dividend clause is invalid.

Any tax planning technique is open to challenge on the basis that the underlying legal construct is invalid. This follows from the fundamental principle of taxation law that the actual legal result of a transaction, rather than its form, is relevant to tax liability. In *Champ v. The Queen*, 83 D.T.C. 5029 (F.C.T.D.), for example, a dividend payment was found to be invalid in law, and the form of the payment was disregarded for tax purposes. In that case, the taxpayer and his wife held two-thirds and one-third of the shares of the corporation respectively. While the Articles of Incorporation of the company specifically stated that "dividends may be declared and paid according to . . . the number of shares held", dividends were paid to only one class of shares, which were held exclusively by the wife. The court found that the taxpayer diverted his *pro rata* share of the dividends, and included this indirect payment in his income by way of s. 56(2). The approach adopted by the Federal Court in *Champ* is in keeping with the "ineffective transaction" test for denying a taxpayer the benefit of a particular transaction, which was articulated by this Court in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536.

In the present case, Mrs. McClurg received a dividend payment of $10,000 on the basis of the discretionary dividend clause that has been found to be invalid. Therefore, the taxpayer's characterization of the true nature of the payment cannot stand. Instead, the analysis must proceed on the basis that the dividend declared in each of the three years in question should have been allocated equally to the shares in classes A and B. Of the $10,000 dividend declared, then, $8,000 was pay-

véritable de l'opération en question. Sauf le respect que je lui dois, je ne saurais toutefois être d'accord avec lui quant à l'application du par. 56(2) dans le présent pourvoi. Nos divergences portent sur l'interdépendance du droit des sociétés et des questions d'impôt sur le revenu en l'espèce, et sur ma conclusion selon laquelle la clause de dividende discrétionnaire est nulle.

Toute technique de planification fiscale peut être contestée pour le motif que le concept juridique qu'elle applique est nul. Cela découle du principe fondamental de droit fiscal selon lequel c'est le résultat juridique même d'une opération plutôt que sa forme qui est pertinent en matière d'assujettissement à l'impôt. Dans l'affaire *Champ v. The Queen*, 83 D.T.C. 5029 (C.F.S.P.I.), par exemple, un versement de dividende a été jugé illégal et on n'a pas tenu compte de la forme du versement pour les fins de l'impôt. Dans cette affaire, le contribuable et son épouse détenaient respectivement deux tiers et un tiers des actions de la société. Même si les statuts constitutifs de la compagnie précisaient que «des dividendes peuvent être déclarés et payés [. . .] selon le nombre d'actions détenues», les dividendes n'ont été versés qu'à une catégorie d'actions, qui était détenue exclusivement par l'épouse. La cour a conclu que le contribuable avait détourné sa part des dividendes, et inclus ce paiement indirect dans son revenu en vertu du par. 56(2). Cette approche adoptée par la Cour fédérale dans l'affaire *Champ* est conforme au critère de «l'opération sans effet» lorsqu'il s'agit de refuser à un contribuable le bénéfice d'une opération donnée, critère qui a été élaboré par notre Cour dans l'arrêt *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536.

En l'espèce, Mme McClurg a reçu un dividende de 10 000 $ en vertu de la clause de dividende discrétionnaire qui a été jugée invalide. Par conséquent, la caractérisation par le contribuable de la nature véritable du paiement ne saurait valoir. Il faut plutôt poursuivre l'analyse en tenant compte du fait que le dividende déclaré pour chacune des trois années en question aurait dû être attribué également aux actions des catégories A et B. Eu égard au dividende de 10 000 $ déclaré, la somme

able to Mr. McClurg, and only $2,000 was payable to Mrs. McClurg.

Before turning to the specifics of the application of s. 56(2) to the facts at hand, it is necessary to comment on two points raised by the Chief Justice. First, he states that a dividend payment does not fall within the scope of s. 56(2). I agree with this view so far as it refers to the typical situation where the dividend payment is within the powers of the corporation and the shareholder is *bona fide* entitled to the dividends. It must be emphasized, however, that $8,000 of the dividend payment to Mrs. McClurg was not a *bona fide* dividend payment, but a receipt of dividend income otherwise payable to her husband. As was the case in *Champ v. The Queen*, *supra*, a payment which is not in law a dividend payment cannot serve as a bar to the application of s. 56(2).

Secondly, I must comment on the relevance of Mrs. McClurg's contribution to the business. At trial, it was found as a fact that Wilma McClurg contributed to the establishment and operation of the business. The Chief Justice considers this fact to be of relevance to the resolution of the matter before this Court, because it indicates that the dividend payment was not the product of a blatant tax avoidance scheme, but rather a benefit conferred for adequate consideration in the context of a legitimate business relationship. In other words, the dividend payment can be justified because of the efforts made by Mrs. McClurg on behalf of the company.

With respect, this fact is irrelevant to the issue before us. To relate dividend receipts to the amount of effort expended by the recipient on behalf of the payor corporation is to misconstrue the nature of a dividend. As discussed earlier, a dividend is received by virtue of ownership of the capital stock of a corporation. It is a fundamental principle of corporate law that a dividend is a return on capital which attaches to a share, and is in no way dependent on the conduct of a particular shareholder.

de 8 000 $ était alors payable à M. McClurg et seulement 2 000 $ étaient payables à Mme McClurg.

Avant d'examiner en détail l'application du par. 56(2) aux faits de l'espèce, il me faut commenter deux points soulevés par le Juge en chef. Il affirme tout d'abord que le versement d'un dividende n'est pas visé par le par. 56(2). Je souscris à ce point de vue dans la mesure où il s'agit de la situation typique où un tel versement relève des pouvoirs de la société et où l'actionnaire a vraiment droit aux dividendes. Il faut cependant souligner relativement au dividende versé à Mme McClurg, que la somme de 8 000 $ n'était pas un véritable paiement de dividende mais plutôt le versement d'un revenu de dividende payable par ailleurs à son époux. Comme ce fut le cas dans l'affaire *Champ v. The Queen*, précitée, un paiement qui n'est pas légalement un versement de dividende ne saurait empêcher l'application du par. 56(2).

En second lieu, je me dois de commenter la pertinence de la contribution de Mme McClurg à l'entreprise. Au procès, il a été établi que Wilma McClurg a contribué à l'établissement et à l'exploitation de l'entreprise. Le Juge en chef considère que ce fait est pertinent pour les fins du règlement du litige devant notre Cour, parce qu'il indique que le versement de dividende ne résultait pas d'une tentative flagrante d'évitement fiscal mais qu'il constituait plutôt un avantage trouvant sa contrepartie suffisante dans le cadre d'une relation d'affaire légitime. En d'autres termes, ledit versement peut être justifié en raison des efforts que Mme McClurg a déployés pour le compte de la compagnie.

En toute déférence, ce fait n'est pas pertinent pour les fins du litige dont nous sommes saisis. C'est mal interpréter la nature d'un dividende que de lier le versement d'un dividende à la somme des efforts déployés par le bénéficiaire pour le compte de la société payante. Comme nous l'avons dit auparavant, le versement d'un dividende résulte de la propriété du capital-actions d'une société. Selon un principe fondamental du droit des sociétés, un dividende est le rapport du capital qui se rattache à une action et ne dépend d'aucune façon de la conduite d'un actionnaire donné.

In the present case, a $10,000 dividend was declared by the directors of Northland Trucks and was allocated in its entirety to Mrs. McClurg, ostensibly in return for work and services rendered to the company. Regardless of what motivated the directors to allocate the dividends to Mrs. McClurg, if she were somehow *bona fide* entitled to the dividends, it would be an entitlement based solely on her ownership of shares of the corporation, and s. 56(2) would not apply. In other words, s. 56(2) clearly is inapplicable to a transaction wherein a shareholder is in receipt of a dividend properly allocated to his or her shares.

Application of Section 56(2)

Turning to the application of s. 56(2) to the instant case, I find it useful as a starting point to break the provision down into its constituent parts. Such an analytical framework was adopted by Cattanach J. in *Murphy v. The Queen*, 80 D.T.C. 6314 (F.C.T.D.), where he stated, at pp. 6317-18:

> To fall within subsection 56(2) each essential ingredient to taxability in the hands of the taxpayer therein specified must be present.
>
> Those four ingredients are:
>
> (1) that there must be a payment or transfer of property to a person other than the taxpayer;
>
> (2) that the payment or transfer is pursuant to the direction of or with the concurrence of the taxpayer;
>
> (3) that the payment or transfer be for the taxpayer's own benefit or for the benefit of some other person on whom the taxpayer wished to have the benefit conferred, and
>
> (4) that the payment or transfer would have been included in computing the taxpayer's income if it had been received by him instead of the other person.

It must be determined, then, whether these four elements or prerequisites to the application of s. 56(2) are present in the transaction at hand.

With regard to the first element, the term "payment" has acquired no technical meaning in the *Income Tax Act* and is to be interpreted in its popular sense: see *Murphy*, *supra*, at p. 6320. Furthermore, "property" is defined in very broad

Dans le présent pourvoi, un dividende de 10 000 $ a été déclaré par les administrateurs de Northland Trucks et alloué intégralement à Mme McClurg, manifestement en contrepartie du travail et des services fournis à la compagnie. Quelles que soient les raisons pour lesquelles les administrateurs ont versé les dividendes à Mme McClurg, si elle avait vraiment droit aux dividendes, il s'agirait d'un droit fondé uniquement sur la propriété des actions de la société, et le par. 56(2) ne s'appliquerait pas. En d'autres termes, le par. 56(2) ne s'applique manifestement pas à une opération grâce à laquelle un actionnaire touche un dividende qui est alloué à bon droit à ses actions.

Application du par. 56(2)

En ce qui concerne l'application du par. 56(2) en l'espèce, il est utile, à mon avis, de commencer par séparer les différentes parties de cette disposition. Le juge Cattanach a adopté une telle analyse dans l'affaire *Murphy v. The Queen*, 80 D.T.C. 6314 (C.F.S.P.I.), où il a déclaré aux pp. 6317 et 6318:

> Pour que le paragraphe 56(2) s'applique, toutes les conditions d'assujettissement prévues doivent être réunies.
>
> Voici ces quatre conditions:
>
> (1) il doit y avoir un paiement ou transfert de biens à une personne autre que le contribuable;
>
> (2) paiement ou transfert doit être effectué suivant les instructions ou avec l'accord du contribuable;
>
> (3) paiement ou transfert doit être effectué au profit du contribuable ou de toute autre personne que le contribuable désire avantager;
>
> (4) paiement ou transfert aurait été inclus dans le calcul du revenu du contribuable si ce dernier, au lieu de l'autre personne, l'avait reçu.

Il faut maintenant déterminer si ces quatre éléments ou conditions préalables à l'application du par. 56(2) sont présents dans l'opération en l'espèce.

En ce qui a trait au premier élément, le terme «paiement» n'a pas acquis un sens technique dans la *Loi de l'impôt sur le revenu* et il doit être interprété selon son sens ordinaire: voir *Murphy*, précité, à la p. 6320. En outre, le mot «biens» est

terms in s. 248(1) of the *Income Tax Act*, and specifically includes money. It is also noteworthy that s. 16(1), the predecessor to s. 56(2), originally referred to a transfer of "money, rights or things". Therefore, it appears that the payment in question satisfies the first prerequisite to the operation of s. 56(2). This is confirmed by *Champ v. The Queen*, *supra*, where it was held that the taxpayer effected a "transfer of property" by directing the payment of dividends.

défini d'une façon très large au par. 248(1) de la *Loi de l'impôt sur le revenu* et inclut expressément l'argent. Il convient également de souligner que le par. 16(1), le prédécesseur du par. 56(2), faisait mention à l'origine d'un transport «d'argent, de droits ou de choses». Il semble par conséquent que le paiement en question satisfasse à la première condition requise pour l'application du par. 56(2). Cela est confirmé par l'arrêt *Champ v. The Queen*, précité, dans lequel il a été décidé que le contribuable avait effectué un «transfert de biens» en ordonnant le versement de dividendes.

The second element provides that the payment or transfer be pursuant to the direction of the taxpayer or with the concurrence of the taxpayer. The respondent argued that the payment was made by the company, a legal entity separate from the taxpayer, and to the extent that the taxpayer directed or concurred in the payment of the dividend, this was done in his capacity as a director of the corporation, and not in any personal capacity.

Le second élément prévoit que le paiement ou le transfert doit être effectué suivant les instructions ou avec l'accord du contribuable. L'intimé a soutenu que le paiement avait été effectué par la compagnie, une entité juridique distincte du contribuable, et que dans la mesure où le versement du dividende a été effectué suivant les instructions ou avec l'accord du contribuable, celui-ci avait agi en qualité d'administrateur de la société et non à titre personnel.

Under s. 56(2), however, it is sufficient that such a payment be made with the concurrence of the taxpayer. The facts indicate that the respondent, in his capacity as a shareholder, did not object to the distribution of dividends. The appellant argued that Mr. McClurg's failure to object to the payment to Mrs. McClurg constituted implied concurrence. In other words, since Mr. McClurg did not demand his share of the dividends, he implicitly accepted that the company make an $8,000 payment to his wife. To this end, the appellant relied on *Bronfman, A. v. M.N.R.*, [1965] C.T.C. 378 (Ex. Ct.), at p. 385, in which Dumoulin J. held that the "abstention or indifference" of shareholders who had the power to object to the actions of directors was "tantamount to an approval" and sufficient to invoke s. 16(1), the predecessor to s. 56(2).

Sous le régime du par. 56(2), il suffit toutefois qu'un tel paiement soit fait avec l'accord du contribuable. Les faits indiquent que l'intimé, en sa qualité d'actionnaire, ne s'est pas opposé à la distribution des dividendes. L'appelante a prétendu que l'omission de M. McClurg de s'opposer au paiement fait à Mme McClurg constituait un accord implicite. En d'autres termes, puisque M. McClurg n'a pas réclamé sa part des dividendes, il a implicitement accepté que la compagnie verse la somme de 8 000 $ à son épouse. À cette fin, l'appelante s'est fondée sur l'arrêt *Bronfman, A. v. M.N.R.*, [1965] C.T.C. 378 (C. de l'É.), à la p. 385, dans laquelle le juge Dumoulin a statué que «l'abstention ou l'indifférence» des actionnaires qui avaient le pouvoir de s'opposer aux actes des administrateurs [TRADUCTION] «équivalait à une approbation» et permettait d'invoquer le par. 16(1), le prédécesseur du par. 56(2).

In my view, an individual in control of a corporation can be said to have directed a payment or transfer of property within the meaning of s. 56(2) by exercising that control. Furthermore, even if one accepts the contrary view that the taxpayer did not direct the payment, the payment neverthe-

À mon avis, on peut affirmer qu'un particulier ayant le contrôle d'une société a ordonné un paiement ou un transfert de biens au sens du par. 56(2) en exerçant ce contrôle. Qui plus est, même si on accepte le point de vue contraire selon lequel le contribuable n'a pas ordonné un tel paiement,

less was made with the concurrence of Mr. McClurg in his personal capacity as a shareholder of the company. Thus, the second precondition to the operation of s. 56(2) is met.

The third precondition requires that the payment be for the benefit of the taxpayer or recipient. Since Mrs. McClurg was entitled to only $2,000 in dividends, the $8,000 portion of the payment representing Mr. McClurg's dividend entitlement amounts to a benefit to her under s. 56(2). In addition, Mr. McClurg himself obtained a benefit from the transaction by way of a reduction in income tax. As explained by Cattanach J. in *Murphy v. The Queen*, *supra*, at p. 6318, this type of benefit goes to the very purpose of s. 56(2):

> Subsection 56(2) is to impute receipt of income to the taxpayer that was diverted at his instance to someone else. It is to cover cases where the taxpayer seeks to avoid the receipt of what in his hands would be income by arranging to transfer that amount to some other person he wishes to benefit or for his own benefit in doing so. Apart from any moral satisfaction the practical benefit to the taxpayer is the reduction in his income tax.

Finally, it is obvious that the $8,000 dividend would have been included in Mr. McClurg's income had the allocation been properly made.

Therefore, the four prerequisites to the application of s. 56(2) have been met. Since $8,000 of the $10,000 in dividends attributed to Wilma McClurg on her class B shares was properly attributable to Mr. McClurg, this amount should be included in the computation of his income.

Disposition

In the result, I would allow the appeal and uphold the Minister's reassessment.

Appeal dismissed with costs, WILSON, LA FOREST *and* L'HEUREUX-DUBÉ JJ. *dissenting.*

Solicitor for the appellant: John C. Tait, Ottawa.

Solicitors for the respondent: Bennett Jones, Calgary.

celui-ci a néanmoins été effectué avec l'accord de M. McClurg en sa qualité personnelle à titre d'actionnaire de la compagnie. La deuxième condition préalable relative à l'application du par. 56(2) est donc remplie.

La troisième condition préalable exige que le paiement soit fait au profit du contribuable ou du bénéficiaire. Puisque Mme McClurg n'avait droit qu'à un dividende de 2 000 $, le versement des autres 8 000 $ représentant le dividende auquel avait droit M. McClurg équivaut à un avantage conféré à l'épouse de ce dernier en vertu du par. 56(2). En outre, M. McClurg lui-même a tiré un avantage de l'opération par la réduction de son impôt sur le revenu. Comme l'a expliqué le juge Cattanach dans l'affaire *Murphy v. The Queen*, précitée, à la p. 6318, ce type d'avantage est directement visé par le par. 56(2):

> Le paragraphe 56(2) a pour but d'imputer au contribuable un revenu qui a été, sur ses instructions, attribué à quelqu'un d'autre. Il vise les cas où le contribuable cherche à éviter de recevoir ce qui serait, entre ses mains, un revenu en s'arrangeant pour transférer ce montant au profit de quelqu'un d'autre ou à son propre profit. À part procurer une satisfaction morale, l'opération permet au contribuable de réduire son impôt sur le revenu.

Enfin, il est évident que le dividende de 8 000 $ aurait été inclus dans le revenu de M. McClurg si l'attribution avait été faite correctement.

Par conséquent, les quatre conditions préalables de l'application du par. 56(2) ont été remplies. Puisque des 10 000 $ attribués à Wilma McClurg à titre de dividendes provenant de ses actions de la catégorie B, 8 000 $ étaient attribuables à M. McClurg, cette somme devrait être incluse dans le calcul de son revenu.

Dispositif

En conclusion, je suis d'avis d'accueillir le pourvoi et de maintenir la nouvelle cotisation du Ministre.

Pourvoi rejeté avec dépens, les juges WILSON, LA FOREST *et* L'HEUREUX-DUBÉ *sont dissidents.*

Procureur de l'appelante: John C. Tait, Ottawa.

Procureurs de l'intimé: Bennett Jones, Calgary.

TAB 26

Court of Appeal
McGauley v. B.C.
Date: 1989-09-19

R.R. Sugden and D.J. Taylor, for appellant Davis & Co.

R.M.L. Basham and D.M. Rush, for appellant J.R. Bentley.

B. Wallace, Q.C. and P.C. Behie, for appellant Pannell, Kerr, MacGillivray.

D.C. Harbottle and M. Baird, for all other appellants.

K.C. MacKenzie, Q.C. and M.M. MacKinnon, for respondents.

R.G. Ward and T. Pearkes, for third party Coopers & Lybrand Ltd.

(Vancouver Nos. CA10945, CA10950, CA10994, CA10996, CA10967)

September 19, 1989. The judgment of the court was delivered by

[1] CUMMING J.A.:- This appeal is from the decision of the chambers judge dismissing the applications of the defendants other than Her Majesty the Queen and James Henry Thomas for an order under R. 19(24) that the statement of claim be struck out as disclosing no reasonable claim [[1989] B.C.W.L.D. 1640]. It falls to be decided on the pleadings as they stand.

[2] The genesis of the dispute is the financial collapse in 1985 of the Teachers' Investment and Housing Cooperative ("T.I.H.C.") as a result of which lawsuits have been commenced by both:

(a) the T.I.H.C. through its trustee, Coopers & Lybrand Ltd.;

(b) the individual depositors in T.I.H.C.

[3] The principal issue is whether, under the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189, namely that only a corporation (which T.I.H.C. is) may sue for a wrong done to it, the learned chambers judge erred in failing to strike out the statement of claim on the basis that the plaintiffs are claiming personally for damages sustained as a consequence of the wrongs suffered by the cooperative.

[4] At present four actions, two at the suit of Coopers & Lybrand, the trustee of the estate and assets of T.I.H.C., and two brought by the individual depositors have been

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ordered to be heard together at the trial scheduled to commence 2nd January 1990. In addition, a fifth action, known as the Abbott action, in which some 3,000 of T.I.H.C.'s approximately 45,000 member depositors are plaintiffs and in which, we are told, the claims are identical to those in the case at bar, is pending.

[5] The plaintiffs claim damages from the defendants for alleged negligence, breach of statutory duty, breach of fiduciary duty and breach of trust.

[6] The defendants include the directors and chief executive officer, the solicitors and the accountants to the T.I.H.C. as well as the Superintendent of Credit Unions, Cooperatives and Trust Companies and the province of British Columbia.

[7] Coopers & Lybrand, as trustee, has claimed damages allegedly suffered by T.I.H.C. arising from alleged negligence, breach of statutory duty, breach of fiduciary duty and breach of trust by the defendants.

[8] Both statements of claim are founded on the following transactions entered into by the T.I.H.C.:

(A) joint venture transactions entered into by the T.I.H.C.; loss claimed, $37,000,000.

(B) commercial loans entered into by the T.I.H.C.; loss claimed, $18,000,000.

(C) acquisition by title of a trust company; loss claimed, $14,000,000.

[9] An examination of the present pleadings in these actions reveals the striking similarity in the basis of the claims made:

(A) This action:

> 18. From 1981 to January 1982 the TIHC acquired four parcels of land in Calgary and one parcel in Vancouver for development or resale in joint venture with certain real estate agents. The TIHC loaned to the agents their share of the purchase price of the properties …
>
> 25. The TIHC's purchase of these properties through partnership or joint venture arrangements was imprudent, of a high risk nature, contrary to the purpose of the TIHC and the public interest, ultra vires the TIHC and beyond the mandate of the TIHC as reflected in its Memorandum, its Rules and the Act.

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29. When the TIHC closed its doors on November 5, 1985 the book value of the properties referred to in paragraph 4 [sic] hereof was $45,505,168.00 while their appraised value in December 1985 was only $9,205,000.00, representing a loss to the TIHC of $37,000,000.00.

The Coopers action:

14. During the period 1980 through 1982, TIHC entered into partnership or joint venture arrangements for the purpose of developing real property with H. Haebler Co. Ltd. in Vancouver and Donray Investments Ltd. in Calgary, Alberta and Phoenix, Arizona. Donray's principals were Raymond Kureluk and Donald Flatt.

19. As at November 5, 1985, the book value of the properties purchased through partnership or joint venture arrangements was $46,505,168 while their appraised value in December of 1985 was only $9,105,000, representing a loss to TIHC of approximately $37,000,000.

20. TIHC's purchase of such properties through partnership or joint venture arrangements was imprudent, of a high risk nature, contrary to the purposes of TIHC and the public interest, *ultra vires* TIHC and beyond the mandate of TIHC as reflected in its Memorandum, its Rules and the Act.

(B) This action:

30. At all material times, the Act and the TIHC's Memorandum and Rules provided that the TIHC could only loan money to its members. At the date of its incorporation, the TIHC's original Rules provided that:

"Any person over the age of 16 years who is actively engaged as a teacher or who has taught school within the preceding five years, or who is a member of the B.C. Teachers Federation, or who is an employee of the B.C. Teachers Federation, or any corporate body having as one of its objectives the promotion of education may be admitted to membership."

31. The definition of "member" was expanded through numerous amendments to the rules including:

(a) In 1964 bodies corporate "having a membership mainly of teachers" became eligible for membership, but only with the approval of the directors";

(b) in 1965, the Board of Directors approved "in principle, the lending of money to commercial borrowers up to 15 per cent of the total assets of the Association at any time";

(c) an amendment was made by Extraordinary Resolution dated February 21, 1969 which permitted admission to membership of "any body corporate with the approval of the Directors", without any qualifications associated with education or the teaching profession, or without any qualifications what soever.

34. Between 1978 and 1984, the TIHC entered into loans of a commercial nature (more particularly set out and described in attachment "C" hereto). Losses sustained on these loans are estimated to be $18,000,000.00 by the trustee of the TIHC.

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40. The commercial loans extended by the TIHC were imprudent investments, of a high-risk nature, contrary to the purposes of the TIHC and the public interest, ultra vires the TIHC, prohibited by the Act (particularly Sections 14 and 15 thereof) and beyond the mandate of the TIHC as reflected in its Memorandum, its Rules and the Act.

The Coopers action:

20A. At all material times, the Act and TIHC's Memorandum and Rules limited TIHC's powers to loan money, except to its members. At the date of its incorporation, TIHC's original Rules provided that:

"Any person over the age of 16 years who is actively engaged as a teacher or who has taught school within the preceding five years, and who is a member of the B.C. Teachers' Federation, or who is an employee of the B.C. Teachers' Federation, or any corporate body having as one of its objects the promotion of education may be admitted to membership."

20B. The definition of "member" was expanded through numerous amendments to the Rules, including:

(a) In 1964, bodies corporate "having membership mainly of teachers" became eligible for membership but only with the approval of the Directors;

(b) In 1965, the Board of Directors approved "In principle, the lending of money to commercial borrowers up to 15% of the total assets of the Association at any time";

(c) An amendment was made by Extraordinary Resolution dated February 21, 1969 which permitted admission to membership of "any body corporate with the approval of the Directors", without any qualifications associated with education or the teaching profession or indeed without any qualifications whatsoever.

21. Through these provisions TIHC diversified from loans made solely to individual members (mainly for the purposes of residential housing mortgages) into commercial loans to any body corporate willing to pay a nominal membership fee (secured usually by second mortgages). Commercial loans increased from 19% of the total mortgage portfolio in 1970 to 30% by 1982. Such commercial loans were approved and granted by TIHC without proper or any appraisals, financial statements, net worth statements or other supporting financial information or security.

24. During the period 1978 to 1984, TIHC entered into loans of a commercial nature, some of which are more particularly set out and described in Attachment "B" hereto. Losses sustained by TIHC as a result of these loans are estimated to be approximately $18,000,000.

25. The commercial loans extended by TIHC were imprudent investments, of a high risk nature, contrary to the purposes of TIHC and the public interest, *ultra vires* TIHC, prohibited by the Act (and particularly Sections 14 and 15 thereof) and beyond the mandate of TIHC as reflected in its Memorandum, its Rules and the Act.

(C) This action:

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41. In 1976 the TIHC began operating its wholly owned subsidiary Teachers Trust Company, the business of which was restricted to estate, trust and agency services.

42. In approximately 1982, the TIHC began investigating the possibility of purchasing an existing federally incorporated trust company which would later amalgamate with Teachers Trust Company and operate as a full-service trust company for the benefit of the general public as well as its members.

48. In 1985 the Norfolk Trust Company changed its name to Discovery Trust Company. Pursuant to the approvals referred to in paragraphs 44 to 47 herein, the TIHC acquired shares of Discovery Trust Company of Canada (hereinafter referred to as "discovery"), increasing the actual TIHC investment in Norfolk/Discovery to a total of $15,852,705.00.

50. Upon the sale of Discovery in 1986, the Plaintiffs realised only $1,500,000.00 for a loss of approximately $14,352,000.00.

51. The TIHC's purchase of the shares of Norfolk was specifically prohibited by the Act (in particular, Section 2 thereof), which excludes from the business of an association "the business of banking or insurance, or of a trust company as defined by the *Trust Company Act".*

52. Further, teh TIHC's purchase of the shares of Norfolk was an imprudent investment, ultra vires the objects of the TIHC, contrary to the purposes of the TIHC and the public interest and beyond the mandate of the TIHC as reflected in its Memorandum, its Rules and the Act, and could and did result in significant loss to the TIHC and its members.

The Coopers action:

25A. In 1976 TIHC began operating its wholly owned subsidiary, Teachers' Trust Company, the business of which was restricted to estate, trust and agency services.

25B. In approximately 1982, TIHC began investigating the possibility of purchasing an existing Federally incorporated trust company which would later amalgamate with Teachers' Trust Company and operate as a full-service trust company for the benefit of the general public as well as its members …

25C. In 1983, TIHC purchased in excess of 75% of the common shares and all the preferred shares of Norfolk Trust Company (later renamed Discovery Trust Company of Canada) for a purchase price of approximately $11,700,000.00.

29. Pursuant to those approvals, TIHC acquired further shares of Discovery Trust to increase its investment to a total of $15,852,705.

30. Upon the sale of Discovery Trust Company of Canada in 1986, the Plaintiff realized only $1,500,000 for a loss of approximately $14,352.00 [sic].

31. TIHC's purchase of the shares of Norfolk Trust Company was specifically prohibited by the Act (and in particular, Section 2 thereof), which excludes from the business of an association "the business of banking or insurance, or of a trust company as defined by the *Trust Company Act".*

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> 32. Further, TIHC's purchase of the shares of Norfolk Trust Company was an imprudent investment, *ultra vires* the objects of TIHC, contrary to the purposes of TIHC and the public interest and beyond the mandate of TIHC as reflected in its Memorandum, its Rules and the Act, and could and did result in significant loss to TIHC.

[10] The essence of the plaintiffs' damage claim is that they suffered a diminution in the value of their deposits. It is set out in para. 103 of their statement of claim in the following terms:

> 103. As a result of the fault of the Defendants and each of them as hereinbefore set out, the Plaintiffs have each sustained loss and damage, equal to 46 cents for each dollar which they had on deposit with the TIHC on November 4 1985, and interest thereon. There may be a further distribution from the trustee of the TIHC which could reduce the amount of the Plaintiffs' losses by 5 to 20 cents per dollar. Particulars of the deposits of each of the Plaintiffs will be provided on request.

[11] Specifically, as against the defendant Davis & Company, the plaintiffs' claims relate entirely to these three impugned sets of transactions as appears from the following paragraphs in their statement of claim:

> 95. The Defendant, Davis & Company, did in fact attend all meetings of the Directors of the TIHC and owed duties to the TIHC, its members and depositors to advise in respect of all matters coming before such meetings for discussion and decision, and more particularly, to properly advise and ensure that the TIHC acted legally, prudently, and within its powers and mandate.
>
> 96. The Defendant, Davis & Company, was in breach of its duties as aforesaid to the TIHC, its members and depositors in that it failed to advise the TIHC, its Directors and senior management properly, or at all, and failed to warn the TIHC, its depositors and members:
>
> (a) that the approval of the Superintendent pursuant to s. 13(2) of the *Act* was required and for the exercise of the powers granted by s. 13(1)(1) of the *Act* with respect to the said partnership or joint venture arrangements (as set out in Attachment "B" hereto) without which such arrangements would be null and void and unenforceable by the TIHC;
>
> (b) that the arrangements in Attachment "B" hereto and the loans of a commercial nature made by the TIHC (as set out in Attachment "C" hereto) were *ultra vires* the objects of the TIHC:
>
> (c) that the loans set out in Attachment "C" hereto were prohibited by the *Act* and s. 14 and s. 15 in particular;
>
> (d) that the arrangements in Attachment "B", and the loans in Attachment "C", were imprudent investments, contrary to the purposes of the TIHC and beyond the mandate of the TIHC as reflected in its memorandum, its rules and the *Act;*

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(e) that the purchase of Discovery and the carrying on of trust business was *ultra vires* the objects of the TIHC, contrary to the purposes of the TIHC and beyond the mandate of the TIHC as reflected in its memorandum, its rules and the *Act;*

all of which could result in loss to the TIHC, its members and depositors, and all of which duties were within the scope of the retainer of Davis & Company as solicitors to the TIHC at the material times.

97. At all material times, the Defendant, Davis & Company, had special expertise in cooperative and credit union matters and dealt directly with the Superintendent as representatives and agents of the TIHC, and they failed to cause the TIHC to seek the Superintendent's approval with respect to certain of the aforesaid joint venture arrangements, they caused the TIHC to seek his approval in some instances pursuant to the wrong Section of the Act, and caused the TIHC to seek and receive his approval when they knew, or should have known, by virtue of, at least in part, the facts herein alleged, that the Superintendent was failing to conduct a proper, or any, investigation of the affairs of the TIHC, and to satisfy himself with respect to the purpose of the request, all as required by the Act. Further, by virtue of the facts herein alleged with respect to seeking the approval of the Superintendent, Davis & Company knew or should have known that the TIHC was denied any opportunity to obtain or to benefit from the advice of the Superintendent and the exercise of his powers, all of which caused damage to the TIHC, its members and depositors.

And, by an amendment allowed by the chambers judge:

97A. The Defendant, Davis & Company, was aware at all material times that the Plaintiffs were relying upon their skill and expertise and counsel to the TIHC to ensure that the Plaintiffs' funds were being employed for properly authorized purposes within the statutory powers of the TIHC. The Defendant, Davis & Company, expressly and by necessary implication as counsel to the TIHC, represented that all loans and investments were properly and legally authorized and within the statutory powers of the TIHC.

[12] In *Rogers v. Bank of Montreal,* 64 B.C.L.R. 63, [1985] 5 W.W.R. 193, 30 B.L.R. 41, affirmed 9 B.C.L.R. (2d) 190, [1987] 2 W.W.R. 364 (C.A.), McKenzie J. at p. 195 succinctly stated the rule in *Foss v. Harbottle* as follows:

As I see it, I must answer two basic questions:

(1) What are the plaintiffs trying to do? and, having decided that:

(2) Are they entitled by law to do it?

The defendants' answer to the first question is that as personal plaintiffs, rather than as a corporate plaintiff, they are trying to get around the ancient barricade erected by *Foss v. Harbottle* (1842), 2 Hare 461, 67 E.R. 189, as reinforced by its numerous offspring, and their answer to the second question is that they are not entitled by law to take the action which only the corporation as plaintiff can take, that is, to sue for

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> consequential damage to themselves resulting from damage inflicted on their company in which they own shares.
>
> In its simplest expression *Foss v. Harbottle* stands for the fundamental principle of company law that a company and its shareholders are different entities and only the company can sue for a wrong done to it.

[13] McKenzie J. went on at p. 210 to quote with approval the following passages from the judgment of the English Court of Appeal in *Prudential Assur. Co. v. Newman Indust. Ltd.,* [1982] 2 W.L.R. 31, [1982] 1 All E.R. 354:

> "… It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property …
>
> "The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action as a means of circumventing the rule in *Foss v. Harbottle.* The plaintiffs succeeded. A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting …"

[14] Immediately following the first of the two extracts I have referred to from *Prudential Assur.* which were quoted by Mr. Justice McKenzie, the English Court of Appeal had gone on to say [p. 49]:

> The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing

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£100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £ 100,000 damages in addition to the £ 100,000 damages recoverable by the company.

Counsel for the plaintiffs sought to answer this objection by agreeing that there cannot be double recovery from the defendant, but suggesting that the personal action will lie if the company's remedy is for some reason not pursued. But how can the failure of the company to pursue its remedy against the robber entitle the shareholder to recover for himself? What happens if the robbery takes place in year 1, the shareholder sues in year 2, and the company makes up its mind in year 3 to pursue its remedy? Is the shareholder's action stayed, if still on foot? Supposing judgment has already been recovered by the shareholder and satisfied, what then?

[15] But this simple illustration, accurate though I consider it to be, may itself tend to oversimplify the issue, postulating as it does that the measure of the loss sustained by the aggrieved shareholder is identical to that sustained by the company. The question as to whether loss suffered by the shareholder is or is not identical to or co-extensive with that sustained by the corporation is irrelevant: the question which is relevant is whether the shareholder's loss is the result of some wrong committed against him in his personal capacity or is simply a consequence of the wrong committed against the corporation. That this is so is apparent from the decision in *Rogers* case. At pp. 199-200 of the report [1985] 5 W.W.R. 193, Mr. Justice McKenzie quoted some and summarized other parts of the statement of claim as follows:

Paragraph 56 is reproduced in its entirety:

"56. The plaintiffs plead that the Defendants knew and intended that as result of their wrongful actions culminating in the trespass to the business and assets of Abacus and the wrongful seizure and conversion of the business and assets of Abacus by the Respondent Morrison, Abacus would suffer the following harm, loss and damage, namely:

"(a) Abacus would become incapable of carrying on its business;

"(b) Abacus would suffer damage to its reputation;

"(c) Abacus would ultimately be placed in bankruptcy;

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"(d) Abacus would be forced to sell many of its assets at substantially less than their value;

"(e) Abacus would become liable for major financial losses of developer/clients by reason of its inability to carry out its obligations to its developer/clients;

"(f) Abacus would be obliged to pay substantial legal fees, Receiver costs, consulting fees and other expenses;

"(g) Abacus would have all of its common and preferred stock delisted from the Alberta and Toronto Stock Exchanges and that all value of those shares would be eliminated;

"(h) Abacus' subsidiary and related companies and entities would be detrimentally affected;

"(i) Abacus would lose all of its management, operating, accounting and sales personnel and its going concern nature and value;

"(j) The aforesaid causes of action of Abacus would be destroyed."

Note that all the particulars exclusively specify harm to Abacus except for the loss of share value in (g) which would in turn redound to the plaintiff's detriment because they owned a lot of them.

Paragraph 57 pleads the vicarious liability of the chartered accountant partnership for Morrison's wrongful acts.

Paragraph 58 details the loss, injury and damage caused individually to each of the three plaintiffs. The paragraph begins with this:

"58. The Plaintiffs plead that as a result of the wrongful actions of the Defendants leading to the wrongful appointment of the Defendant Morrison as Receiver and Manager of the business and assets of Abacus by the Defendant Bank of Montreal, acting through the Defendant Scalf, who instigated the appointment for personal reasons, and by the Defendant Guaranty, resulting in the trespass to and wrongful seizure and conversion of the business and assets of Abacus by the Defendant Morrison, the Plaintiffs suffered loss, injury and damages, particulars of which are as follows …"

It then lists the damage to W. Rogers, who had 3,957,375 shares, which can be summarized as follows:

"Loss of salary and position as an employee;

"Damages to business reputation; and damages to livelihood as a result;

"Loss of dividends that arise from shares;

"Loss of joint control;

"Loss of costs;

"Losses and costs resulting from legal actions by others as a result of the demise of Abacus."

Similar details are then supplied concerning the plaintiff K. Rogers who had

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4,176,957 shares of Abacus, and J.F. Cornwall who had 413,395 shares, except that with respect to Cornwall there is no allegation of loss of joint control.

This is the final paragraph:

"59. The Plaintiffs plead that the Defendant Scalf deliberately and with intent to injure Abacus and in turn the Plaintiffs, set into motion the chain of events described in paragraph '53' herein, and that such acts were unreasonable, without legal justification or excuse and an abuse of process. The Plaintiffs plead that the purpose of the Defendant Scalf in setting this chain of events into motion was for the purpose of causing injury to Abacus and to the Plaintiffs, and not for the purpose of protecting any legitimate business interest of the Defendant Bank of Montreal. The Plaintiffs plead that the Defendant Bank of Montreal is liable for the wrongful acts of its officer and employee, the Defendant Scalf."

[16] Having done so, he said, at pp. 206-207:

The statement of claim, even with its proposed amendments, seems to reiterate that the damage had its impact upon Abacus with only derivative damage to the plantiffs. In the American case of *Martens v. Barrett,* 245 F. 2d 844 (C.A. 5th Circ., 1957), the action was by sole stockholders as individual plaintiffs concerning the operation of a service station which was wholly owned by a corporation with the stockholders' salaries and compensation being paid for as a corporate obligation. The claim was made against the defendants for their alleged committal of certain antitrust acts. The judge said [p. 846]:

"And it is universal that where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery, even though in an economic sense real harm may well be sustained as the impact of such wrongful acts bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership."

[17] McKenzie J. then reviewed the decisions of the British Columbia Court of Appeal in *Brown v. Menzies Bay Timber Co.,* 24 B.C.R. 27, [1917] 2 W.W.R. 658, 34 D.L.R. 452, and of Ruttan J. in *Chow v. Patterson* (1973), 38 D.L.R. (3d) 721 (B.C.S.C.); *Prudential Assur.,* supra; and *Green v. Victor Talking Mach. Co.,* 24 F. 2d 378 (C.A. 2nd Circ., 1928), and at pp. 216-17 said:

My comment is that in fact the pleadings allege the activities were directed against Abacus and were unlawful against Abacus and that the intention was against Abacus, and then the words are added "and the plaintiffs". The pleading conveys to me the idea that the unlawful acts are solely directed to the company with the intention and purpose of injuring the company and then there is hitched to that allegation an intention to injure the plaintiffs.

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> Mr. Jeffery then agreed that it gets down to an intention to injure both the company and the plaintiffs as separate targets.
>
> To me the two ideas are inseparable and I cannot extract or isolate a predominant purpose to injure the plaintiffs. That seems to be what the cases require to found a personal action. The cases require direct damage to the plaintiffs, not indirect damage as a consequence of damage to the company.

[18] In my view, Mr. Justice McKenzie's comment in the first paragraph of this last quoted passage from his judgment aptly describes the situation in the case at bar. In many of the paragraphs of the plaintiffs' statement of claim which I have quoted there has simply been added to the allegations of duties owed to the corporation T.I.H.C. by persons in the position of the appellants and said to have been breached by them the words "its members and depositors" or words to like effect. But is that enough? I think not. The "gravamen", "substance", "real character", or "true basis" of the plaintiffs' claims are for consequential losses occasioned by damage to the cooperative.

[19] Their claims, as previously noted, are, in effect, for diminution in their deposits as a result of the collapse of the T.I.H.C. which itself, it is alleged, was triggered by the losses resulting from the impugned transactions which the plaintiffs say are the result of wrongdoing by the defendants. But the wrongs committed by the defendants were wrongs to the T.I.H.C.

> "For a shareholder to obtain a personal right of action there must be relations between him and the tort-feasor independent of those which the shareholder derives through his interest in the corporate assets and business."

[20] This proposition is taken from the American case of *Green v. Victor Talking Mach. Co.,* supra, and at p. 214 McKenzie J. said of it:

> I am not aware of this decision ever being adopted in Canada or the United Kingdom but I understand it to be a leading case in the United States and it does constitute a good analysis of law which seems to be consistent generally with Canadian and British law and it is an excellent exposition of that law.

[21] In dismissing the defendants' applications based on the rule in *Foss v. Harbottle,* supra, the learned chambers judge stated in his reasons [p. 11]:

> It would seem to me that the nature of a cooperative is such that the relationship which the plaintiffs seek to establish could have occurred.

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That relationship, of course, must be one giving rise to duties, fiduciary and otherwise, owed by the defendants to the plaintiffs distinct from and independent of the duties owed by them to the T.I.H.C. itself.

[22] In the factum filed on behalf of Coopers & Lybrand, reference is made to a number of sections of the Cooperative Association Act, R.S.B.C. 1979, c. 66, which are said to be pertinent in this regard. They are summarized as follows:

Section

1(a)(i): one member one vote.

1(a)(iv): services primarily for members.

1(a)(vi): services and goods as nearly as possible at cost.

3(1): a cooperative is not to operate as a company, nor to be confused therewith. Prohibition against the use of the word "company" or the word "limited".

3(2)(b): no one can use the word "cooperative" unless substantially organized, operated and administered on a cooperative basis, and then only with the superintendent's approval.

6(c)(i): superintendent must be satisfied as to the services which the cooperative will perform for its members.

13(1)(i): a cooperative may not enter into any profit sharing arrangement with anyone unless the arrangement is for the "genuine intention of enabling the association to improve its services to its members" and then only with the approval of the superintendent under s. 13(2).

13(1)(q): it is an ancillary power of every cooperative to carry on, encourage and assist educational and advisory work relating to cooperative activity.

14: prohibition against lending money except to a company organized to do business on a cooperative basis.

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27(1): one member one vote.

30(2): every director must be a member.

48(1): the superintendent will exercise all powers and duties to facilitate organization, operation and administration on a cooperative basis and to protect the public interest.

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[23] Mr. Ward was frank to concede that he had no authority, and I have found none, to support the proposition that a cooperative incorporated as was the T.I.H.C. is exempt from the rule in *Foss v. Harbottle.* The most he could say was that the sections of the Act to which he referred could make it easier to find that the fiduciary relationships contended for do in truth exist.

[24] It is trite law that a cooperative corporation is an entity separate from its members and depositors. See Ish, The Law of Canadian Cooperatives (1981), at p. 17:

> Since a co-operative corporation is a corporate entity, the usual attributes of a corporation apply to it. A corporation is a legal entity distinct from the members or shareholders of the corporation. This distinct legal personality has many consequences. The full recognition of the corporation as being completely separate from its members, and being thus "capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members", was made in the now classical House of Lords case of *Salomon v. Salomon* [[1897] A.C. 22 (H.L.)].

[25] (See also: *Henuset Ranches & Const. Ltd. v. East Central Gas Coop. Ltd.* (1977), 4 Alta. L.R. (2d) 39, 87 D.L.R. (3d) 298, 6 A.R. 347 (C.A.)). It is this existence as an independent entity which attracts the rule in *Foss v. Harbottle.* Thus, to find that fiduciary relationships and duties such as the plaintiffs allege exist we must search elsewhere.

[26] In conducting that search in this case we are confined to the framework of pleadings as they stand. In this regard I have in mind the rule that on an application under R. 19(24) *(a)* every averment of fact in the statement of claim must be taken to be true (as to which see: *B.C. Power Corp. v. A.G.B.C.* (1962), 38 W.W.R. 657 at 675, 34 D.L.R. (2d) 25 (B.C.C.A.); and *Kelley Logging Co. v. Pac. Coyle Navigation Co.,* [1940] 2 W.W.R. 655, [1940] 4 D.L.R. 789 (B.C.S.C.)) and, as well, its companion rule that on argument of a

demurrer (which these applications are) where facts are not averred which might possibly have been denied by a plea if they had been, the presumption runs the other way (as to which see *Foss v. Harbottle,* supra, at p. 207).

[27] What then is necessary to form the basis of a finding that there is or could be a fiduciary relationship between the defendants and the personal plaintiffs apart from the duties the defendants owe to the T.I.H.C. itself?

[28] The latest pronouncement of the Supreme Court of Canada on this subject is found in its judgment rendered 11th August 1989 in the case of *Lac Minerals Ltd. v. Int. Corona Resources Ltd.,* No. 20571 (not yet reported). La Forest J. said, at p. 14:

> There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear.

And at pp. 15-16 he continued:

> In *Guerin v. R.,* [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 (sub nom. *Guerin v. Can.),* Dickson J. (as he then was) discussed the nature of fiduciary obligations in the following passage, at pp. 383-84:
>
> "The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery …
>
> "Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that 'the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion.' Earlier, at p. 4, he puts the point in the following way:
>
> " '[Where there is fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.'
>
> *"I make no comment upon whether this description is broad enough to embrace all fiduciary obligations.* I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> "It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the

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like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. [emphasis added]"

Wilson J. had occasion to consider the extension of fiduciary obligations to new categories of relationships in *Frame v. Smith* [[1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 78 N.R. 40]. She found (p. 136) that:

"… there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not *the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.*

"Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

"(1) The fiduciary has scope for the exercise of some discretion or power.

"(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

"(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [emphasis added]"

At pp. 18-20 he said:

It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. In determining whether the categories of relationships which should be presumed to give rise to fiduciary obligations should be extended, the rough and ready guide adopted by Wilson J. is a useful tool for that evaluation …

This brings me to the second usage of fiduciary, one I think more apt to the present case. The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected. I agree with this comment of Professor Finnin "The Fiduciary Principle", supra, at p. 64:

"What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation". Such a role may generate an actual expectation that that other's interests are being served. This is commonly so with lawyers and investment

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advisors. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility."

It is in this sense, then, that the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship: see D.W. Waters, The Law of Trusts in Canada, 2nd ed. (1984), at p. 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.

[29] The third sense in which the term fiduciary is used is discussed at p. 20 and following but this is not of concern in the present case.

[30] In separate reasons Madam Justice Wilson wrote at p. 2 of her judgment:

It is, in other words, my view of the law that there are certain relationships which are almost per se fiduciary such as trustee and beneficiary, guardian and ward, principal and agent, and that where such relationships subsist they give rise to fiduciary duties. On the other hand, there are relationships which are not in their essence fiduciary, such as the relationship brought into being by the parties in the present case by virtue of their arm's length negotiations towards a joint venture agreement, but this does not preclude a fiduciary duty from arising out of specific conduct engaged in by them or either of them within the confines of the relationship. This, in my view, is what happened here when Corona disclosed to Lac confidential information concerning the Williams Property. Lac became at that point subject to a fiduciary duty *with respect to that information* not to use it for its own use or benefit.

[31] And Mr. Justice Sopinka at pp. 14-15 of his reasons for judgment wrote:

While equity has refused to tie its hands by defining with precision when a fiduciary relationship will arise, certain basic principles must be taken into account. There are some relationships which are generally recognized to give rise to fiduciary obligations: director-corporation, trustee-beneficiary, solicitor-client, partners, principal-agent, and the like. The categories of relationships giving rise to fiduciary duties are not closed nor do the traditional relationships invariably give rise to fiduciary obligation …

When the court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist.In special circumstances, if they are shown to be absent, the relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and

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> ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith,* [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 78 N.R. 40.

[32] These passages which I have quoted from the judgments in *Lac Minerals* lend support to the proposition set out in the respondents' factum as follows:

> 3. "Fact intensive" is underlined in breach of fiduciary cases. The same can be said for the alternative claim for damages for negligent breach of duty in a special relationship. One recent commentator has stated:
>
> "To say that fiduciary duty cases are fact intensive is to imply that the phrase 'fiduciary duty' cannot be confined to any definition. It is, rather, a Protean concept which imposes more or less stringent duties on a person depending on the nature of the relationship, the subject matter of the impugned act, the form of that act and other factors. That is why a sustained, detailed study of the facts is essential to characterize the issue and, if they do give to the inference that a fiduciary duty exists, to determine the scope of that duty."
>
> John L. Howard Q.C.
>
> "Fiduciary Applications - Directors and Officers" Continuing Legal Education, British Columbia, April 1989.

[33] But the focus must be on the facts and deeds which are relied upon to give rise to these special relationships and, in order to maintain an action based upon alleged breach of breaches of the duties said to flow from the special relationship asserted to exist, it seems elemental to say that it is necessary they be pleaded. It is in this respect that, in my view, the statement of claim before us is deficient.

[34] I have read and reread the statement of claim and nowhere in it can I find any pleading of facts, of anything done or said by the defendants to the plaintiffs, of any inquiries directed by the plaintiffs to the defendants or any of them, of any representations, oral or written, made by any of the defendants to any of the plaintiffs affecting the individual plaintiffs in their personal capacity, nor the provision of any particulars which could lend substance to any of the foregoing, which could be said to carry the defendants' obligations and duties to the plaintiffs individually beyond the scope of those they already owed to the T.I.H.C. or to establish any direct nexus or relationship between them and the plaintiffs independent of the cooperative.

[35] Paragraph 78 of the statement of claim warrants comment. It is in the following terms:

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> 78. The Plaintiffs were financially unsophisticated. They deposited their savings with the TIHC relying on the appearance of the TIHC as a sound and stable financial institution managed and regulated in accordance with reasonable standards of prudent financial management which would reasonably protect their savings against loss. At all material times, the Crown and the Defendant Thomas knew or ought to have known that the Plaintiffs were relying on them to discharge their responsibilities competently and without negligence to maintain the prudent investment of their savings and the protection of their capital, and to require that the financial statements published by the TIHC provided reasonably fair and informative particulars of the true financial condition of the TIHC and not misleading and deceptive information.

Significantly, this paragraph is found in that portion of the statement of claim relating to the plaintiffs' claim against the Crown and the defendant Thomas, the Superintendent of Credit Unions, Cooperatives and Trust Companies, who are not parties to this aspect of the appeal. No such allegation is found in the pleadings against the other defendants. And even if it were, it is deficient for want of particularity in the same way I have already described the rest of the statement of claim.

[36] I turn now to consider more particularly the claims against the directors and Bentley, the chief executive officer of the T.I.H.C.

[37] As against them the plaintiffs base their claim in (a) negligence, (b) negligent misrepresentation *(Hedley Byrne & Co. v. Heller & Partners Ltd.,* [1964] A.C. 465, [1963] 3 W.L.R. 101, [1963] 2 All E.R. 575 (H.L.)), (c) ultra vires, or (d) breach of fiduciary duty.

(a) *Negligence*

[38] Paragraphs 86 to 90 of the statement of claim clearly show that the negligence asserted is the failure of these defendants to carry out their duties to the T.I.H.C., i.e., as a result of which the T.I.H.C. has suffered losses. But the plaintiffs' claims in this respect add nothing to the claim brought on behalf of T.I.H.C. by its trustees in respect of those losses.

(b) *Negligent misrepresentation*

[39] The requirements of tort liability on the basis of *Hedley Byrne* are summarized in the judgment of McLachlin J.A. (as she then was) in *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15, 38 C.C.L.T. 51 at 60, as follows:

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(1) A false statement negligently made;

(2) A duty of care on the person making the statement to the recipient. A duty of care does not arise unless

(a) the person making the statement is possessed of special skill or knowledge on the matter in question, and

(b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;

(3) Reasonable reliance on the statement by its recipient;

(4) Loss suffered as a consequence of the reliance.

[40] The plaintiffs have not alleged that they sought the advice of the directors nor have they provided any particulars of any advice given or relied upon. Neither have they alleged that the directors ever held themselves out as either providing advice or as having any special skill or knowledge to do so - indeed, in para. 86 the plaintiffs assert that the directors were teachers by training and, as such, they would not reasonably be expected to have any special skill or expertise to offer.

[41] With regard to the defendant Bentley:

(i) There is no allegation that he was acting as an accountant or adviser to the plaintiffs or was communicating with them in that capacity.

(ii) There is no allegation that Bentley communicated directly with the members in annual general meetings or through the cooperative's annual reports or newsletters in any capacity other than as an officer of the cooperative in the performance of his duty.

(iii) While the plaintiffs say that Bentley was aware that the plaintiffs relied upon his skill and expertise they do not say that they relied on his skill and expertise to do anything other than to act in the best interests of the cooperative as its chief executive officer.

(iv) There are no facts pleaded to establish any special relationship between the plaintiffs and Bentley, the reliance by them on Bentley as a result of that relationship or circumstances such as would make it reasonable for the plaintiffs to rely on Bentley and for him to know that they were doing so.

(v) There is no allegation that the plaintiffs acted on that reliance and suffered individual damage as a consequence thereof.

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(c) *Ultra vires*

[42] The plaintiffs' claim of ultra vires does not give them a personal right of action for damages. It merely permits the plaintiffs to commence an action in a representative capacity on behalf of the cooperative in the event that the cooperative does not itself take proceedings. This recognized exception to the rule in *Foss v. Harbottle* has no no application in the case at bar, T.I.H.C. through Coopers & Lybrand, the trustee in bankruptcy having, in fact, commenced an action against the defendants for the same relief the plaintiffs seek in this action: see *Rose v. B.C. Refinery Co.* (1911), 16 B.C.R. 215, 18 W.L.R. 299 (C.A.); *Sass v. St. Nicholas Mut. Benefit Assn. of Winnipeg,* [1937] S.C.R. 415, [1937] 2 D.L.R. 761; *Wheeler v. Annesley* (1957), 11 D.L.R. (2d) 573 (B.C.S.C.); *Balsdon v. Good Shepherd Shelter Foundation* (1984), 56 B.C.L.R. 369 (C.A.); and Gower, Principles of Modern Company Law, 4th ed. (1979), at pp. 644-54.

(d) *Breach of fiduciary duty*

[43] For the reasons I have already set out I am of the view that the pleadings as they stand do not disclose the existence of any fiduciary relationship between the plaintiffs in their personal capacity and the defendants.

[44] With regard to the defendant Pannell Kerr MacGillivray ("P.K.M."), the auditors, who have not been joined as a defendant in the actions brought by Coopers & Lybrand, although they have been added as a third party therein, it appears that the plaintiffs are claiming against them on the basis of the tort of negligent misstatement in the presentation of the financial statements of T.I.H.C.

[45] In the original statement of claim, para. 91 read as follows:

> 91. The defendant auditors owed a duty to the TIHC, its members and depositors, to report whether the financial statements issued by the TIHC presented fairly the financial position of the TIHC and its subsidiary trust company.

[46] On the return of the motions to strike out the statement of claim, the plaintiffs brought an application to amend their statement of claim which was allowed by the learned chambers judge. As a result para. 91 now reads:

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> 91. The Defendant auditors addressed their published opinions to the members and were aware that the Plaintiffs relied directly and indirectly on the published financial statements of the TIHC as fairly presenting the financial position of the TIHC. The Defendant auditors were aware of the Plaintiff's reliance and intended the Plaintiffs to rely upon the published financial statements of the TIHC which gave the TIHC the appearance of a sound financial institution in which the Plaintiffs' deposits were adequately protected against loss. The Defendant auditors allowed their opinions to be published with the intent that they be relied upon as aforesaid.

[47] It is P.K.M.'s position that the pleading as it now stands is deficient in that it fails to plead two of the essential elements in the tort of negligence misstatement, namely (a) reasonable reliance on the statement by its recipient and (b) loss suffered as a consequence of the reliance.

[48] While the issue of reliance is, at best, inartistically raised (and is singularly devoid of particularity) the amended pleading is clearly deficient in that it does not allege loss suffered as a consequence.

[49] In *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982), 30 B.C.L.R. (2d) 45 (S.C.), McLachlin J. (as she then was) said, at p. 47:

> … it seems to me obvious that the court will not give its sanction to amendments which violate the rules which govern pleadings. These include the requirements relating to conciseness (R. 19(1)); material facts (R. 19(1)); particulars (R. 19(11)); and the prohibition against pleadings which disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious (R. 19(24)). With respect to the latter, it may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial: *Minnes v. Minnes* (1962), 39 W.W.R. 112, 34 D.L.R. (2d) 497 (B.C.C.A.); *B.C. Power Corp. v. A.G.B.C.* (1962), 38 W.W.R. 577, 34 D.L.R. (2d) at 211 (B.C.C.A.). If there is any doubt, it should be resolved in favour of permitting the pleadings to stand: *Winfield v. Interior Engr. Services Ltd.* (1969), 68 W.W.R. 383, 4 D.L.R. (3d) 71 (B.C.S.C.). While these cases deal with striking out claims already pleaded, consistency demands that the same considerations apply to the question of amendment to permit new claims.

[50] Applying this reasoning I do not think that the amendment should have been allowed, but I do not rest my decision on that basis. Even if the amended para. 91 does not raise a new cause of action but, as the plaintiffs contend, simply provides more detail of the facts upon which the plaintiffs rely to establish a duty on the part of the defendant auditors, the pleading against P.K.M. as amended discloses no reasonable claim and cannot stand.

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[51] It was urged upon us on the authority of *Alcan Smelters & Chemicals Ltd. v. Can. Assn. of Smelter & Allied Wkrs., Loc. 1* (1977), 3 B.C.L.R. 163 (S.C.); and *F.B.D.B. v. Shearwater Marine Ltd.* (1978), 9 B.C.L.R. 380, 30 C.B.R. (N.S.) 89 (S.C.), that R. 19(24) is only to be used in plain and obvious cases and where the issue is absolutely beyond doubt. In applying these principles I do not think that the court should shrink from performing its duty even though the question may be one of some difficulty. In this regard I adopt what was said by Hunter J. of the High Court of Hong Kong in *Wharf Properties Ltd. v. Eric Cumine Assoc.,* [1985] L.R.C. (Comm.) 401 at 409-10:

> (3) Finally, Mr. Lane argued that it was not open to the court to construe clause 5(e) on a striking out application. This defendant's proper course, he submitted, was to file a defence and then ask for and argue the matter upon a preliminary issue. It was not suggested that the court or the parties would then have been in any better or different position. But on the authority of *Hubbuck and Sons Ltd v. Wilkinson, Heywood and Clark Ltd* [1899] 1 QB 86 it was said, in the words of Lindley, M.R., that the preliminary issue procedure is "appropriate to cases requiring argument and careful consideration. The second and more summary procedure (striking out) is only appropriate to cases which are plain and obvious". Therefore submitted Mr. Lane the court should do not more than say that the matter was not plain and obvious and defer its decision on consideration to some future date. The submission echoes the discussion in other authorities, when the court's summary powers are invoked purely on a question of law, as to whether the court is free to decide the point, or whether it has first to decide whether it is a sufficiently "plain case" to be decided in that particular manner, see for example *Bigg v. Boyd Gibbons* [1971] 2 All ER 183.
>
> Whilst recognising the value of the warning given in *Hubbuck's* case, I cannot accept that it can be said literally to represent the modern practice. A glance at some of the major rulings given on striking out applications in recent years such as *Rondel v. Worsley* [1969] 1 AC 191 and *Arenson v. Arenson* [1977] AC 405 shows the court's readiness not to postpone, but to decide difficult questions on such an application, when appropriate. In a case where all the relevant facts are known and undisputed, and where the point in issue is purely one of law or construction, I think that the court can and should decide the point at any convenient stage in the proceedings. If all the necessary material is before the court, it would be lamentable to postpone a decision and force the parties to incur further costs. I think that Lord Denning, M.R.'s observations in *Tiverton Ltd v. Wearwell Ltd* [1975] Ch 145, 156, about the futility of repeating the same argument at a trial, and the court's practice of deciding "difficult and arguable points" under both Order 14 and Order 86 are really of general application, and apply in proper circumstances to Order 18, rule 19. *Carl-Zeiss-Stiftung v Rayner* (No. 3) [1969] 3 All ER 897, *per* Buckley, J., at p. 908. In my judgment this application is a proper time to decide the points of law raised, and further to decide them without any preliminary claim or assertion to the effect that

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they were "plain and obvious", see *Forster v Outred & Co* [1982] 1 WLR 86, *per* Dunn, L.J.

[52] "Plain and obvious" does not necessarily mean "easy".

[53] I conclude with this caution. These reasons for judgment must be read in relation to the pleadings as they stand before us. There is a line of authority, of which such cases as *Gadsden v. Bennetto* (1913), 23 Man. R. 33, 3 W.W.R. 1109, 9 D.L.R. 719 (C.A.); *Allen v. Hyatt* (1914), 17 D.L.R. 7 (P.C.); and *Caparo Indust. Plc. v. Dickman,* [1989] 2 W.L.R. 316, [1989] 1 All E.R. 798 (C.A.), are examples, where special or fiduciary duties of care have been found to exist between directors of a corporation and its shareholders (as distinct from the directors' duties to the corporation itself) or between auditors of a corporation and its shareholders (as distinct from the auditors' duties to the corporation itself) and it is possible that some of the plaintiffs or other members and depositors in T.I.H.C. may be in a position to plead and prove facts and circumstances sufficient to entitle them to maintain an action for relief in their personal capacity. But that is not this case.

[54] Accordingly, I would allow the appeal and direct that the statement of claim be struck out.

Appeal allowed.

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TAB 27

COLORADO REVISED STATUTES

*** This document reflects changes current through all laws passed at the Second Regular Session of the Seventieth General Assembly of the State of Colorado (2016) and changes approved by the electorate at the General Election on November 8, 2016 ***

TITLE 25. PUBLIC HEALTH AND ENVIRONMENT
PRODUCTS CONTROL AND SAFETY
ARTICLE 5.5. DAIRY PRODUCTS, IMITATION DAIRY PRODUCTS, AND FROZEN DESSERTS
PART 1. DAIRY PRODUCTS

GO TO COLORADO STATUTES ARCHIVE DIRECTORY

C.R.S. 25-5.5-117 (2016)

25-5.5-117. Raw milk

(1) The acquisition of raw milk from cows or goats by a consumer for use or consumption by the consumer shall not constitute the sale of raw milk and shall not be prohibited if all of the following conditions are met:

(a) The owner of a cow, goat, cow shares, or goat shares shall receive raw milk directly from the farm or dairy where the cow, goat, or dairy herd is located and the farm or dairy is registered pursuant to subsection (2) of this section. A person who is the owner of a cow share or goat share in a cow, goat, or dairy herd may receive raw milk on behalf of another owner of the same cow, goat, or dairy herd. A person who is not an owner of a cow share or goat share in the same cow, goat, or dairy herd shall not receive raw milk on behalf of the owner of a cow share or goat share.

(b) The milk is obtained pursuant to a cow share or a goat share. A cow share or a goat share is an undivided interest in a cow, goat, or herd of cows or goats, created by a written contractual relationship between a consumer and a farmer that includes a legal bill of sale to the consumer for an interest in the cow, goat, or dairy herd and a boarding contract under which the consumer boards the cow, goat, or dairy herd in which the consumer has an interest with the farmer for care and milking, and under which the consumer is entitled to receive a share of milk from the cow, goat, or dairy herd.

(c) A prominent warning statement that the milk is not pasteurized is delivered to the consumer with the milk or is displayed on a label affixed to the milk container; and

(d) Information describing the standards used by the farm or dairy with respect to herd health,

and in the production of milk from the herd, is provided to the consumer by the farmer together with results of tests performed on the cows or goats that produced the milk, tests performed on the milk, and an explanation of the tests and test results.

(2) Registration of a farm or dairy as required by paragraph (a) of subsection (1) of this section shall be accomplished by delivering to the Colorado department of public health and environment a written statement containing:

(a) The name of the farmer, farm, or dairy;

(b) A valid, current address of the farmer, farm, or dairy; and

(c) A statement that raw milk is being produced at the farm or dairy.

(3) Retail sales of raw, unpasteurized milk shall not be allowed. Resale of raw milk obtained from a cow share or goat share is strictly prohibited. Raw milk that is not intended for pasteurization shall not be sold to, or offered for sale at, farmers' markets, educational institutions, health care facilities, nursing homes, governmental organizations, or any food establishment.

(4) No person who, as a consumer, obtains raw milk in accordance with this section shall be entitled to sell or redistribute the milk.

(5) No producer of raw milk shall publish any statement that implies approval or endorsement by the Colorado department of public health and environment.

HISTORY: Source: L. 2005: Entire section added, p. 365, § 1, effective April 22.

TAB 28

IDAHO CODE
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*** Statutes current through all legislation from the 2017 regular session (Chapters 1 through 337), effective prior to July 1, 2017 ***

GENERAL LAWS
TITLE 37. FOOD, DRUGS, AND OIL
CHAPTER 11. ACQUISITION OF RAW MILK

Go to the Idaho Code Archive Directory

Idaho Code § 37-1101 (2017)

§ 37-1101. Acquisition of raw milk and raw milk products by owner

(1) The acquisition of raw milk or raw milk products from cows, sheep or goats by an owner of such cows, sheep or goats for use or consumption by the owner or members of the owner's household shall not constitute the sale or retail sale of raw milk or raw milk products and shall not be prohibited. The acquisition of raw milk or raw milk products from cows, sheep or goats by an owner of a cow share, sheep share or goat share for use or consumption by the owner or members of the owner's household shall not constitute the sale or retail sale of raw milk or raw milk products and shall not be prohibited provided the following conditions are met:

(a) Unless otherwise permitted by the Idaho state department of agriculture, no more than seven (7) cows, fifteen (15) sheep or fifteen (15) goats may be kept as part of a cow share, sheep share or goat share program.

(b) The owner of a cow share, sheep share or goat share shall receive raw milk or raw milk products directly from the farm or dairy where the cow, sheep, goat or dairy herd is located and the farm or dairy shall be registered pursuant to subsection (2) of this section. A person who is the owner of a cow share, sheep share or goat share in a cow, sheep, goat or dairy herd may receive raw milk or raw milk products on behalf of another owner of the same cow, sheep, goat or dairy herd. A person who is not an owner of a cow share, sheep share or goat share in the same cow, sheep, goat or dairy herd shall not receive raw milk or raw milk products on behalf of the owner of a cow share, sheep share or goat share.

(c) The raw milk or raw milk products are obtained pursuant to the ownership of a cow, sheep, goat, cow share, sheep share or goat share. A cow share, sheep share or goat share is an undivided ownership interest in a cow, sheep, goat or herd of cows, sheep or goats, created by a written

contractual relationship between an owner and a farmer that includes a bill of sale, stock certificate or other written evidence satisfactory to the director of the Idaho state department of agriculture of a bona fide ownership interest in the cow, sheep, goat or dairy herd. Such written contractual relationship shall also include boarding terms under which the cow, sheep, goat or dairy herd are boarded, milked and cared for. Such written contractual relationship shall also clearly set forth that the share owner is entitled to receive a share of milk or milk products from the cow, sheep, goat or dairy herd and contain a conspicuous notification that the milk or milk products are raw and not pasteurized.

(d) Information describing the standards used by the farm or dairy with respect to herd health, and in the production of milk from the herd, is provided to the share owner by the farmer together with results of tests performed on the cows, sheep or goats that produced the milk, tests performed on the milk and an explanation of the tests and test results.

(e) A farm or dairy operating a cow share, sheep share or goat share program with more than three (3) cows, seven (7) sheep or seven (7) goats shall test such raw milk or raw milk products at a frequency of at least four (4) separate months during any consecutive six (6) month period. Each batch of raw milk shall test negative for drugs. Milk quality tests and drug tests shall be conducted utilizing testing methods approved by the Idaho state department of agriculture. In no event shall such raw milk or raw milk products contain:

(i) More than fifteen thousand (15,000) bacteria per milliliter;

(ii) More than twenty-five (25) coliform per milliliter;

(iii) More than five hundred thousand (500,000) somatic cells per milliliter of raw milk from a cow or more than seven hundred fifty thousand (750,000) somatic cells per milliliter of raw milk from a sheep or goat.

(f) Whenever three (3) of the last five (5) consecutive bacteria, coliform, or somatic cell tests exceeds any of the milk quality standards listed in this section, the cow share, sheep share or goat share owners shall be notified and no milk shall be offered for human consumption until such time it meets the standard.

(g) Milk testing positive for drugs shall not be used for human consumption.

(h) All cows, sheep or goats kept as part of a cow share, sheep share or goat share program shall be tuberculosis and brucellosis free and shall be tested for tuberculosis and brucellosis annually.

(2) Registration of a farm or dairy as required by subsection (1)(b) of this section shall be accomplished by delivering to the Idaho state department of agriculture a written statement containing:

(a) The name of the farmer, farm or dairy;

(b) A valid, current address of the farmer, farm or dairy; and

(c) A statement that raw milk or raw milk products are being produced at the farm or dairy.

(3) No person who obtains raw milk or raw milk products in accordance with this section shall sell such raw milk or raw milk products. Unless otherwise permitted by the Idaho state department of agriculture, it shall be unlawful for an owner of a cow, sheep, goat, cow share, sheep share or goat share to sell, offer for sale or advertise for sale to any person or distribute to any restaurant or food establishment, grocery store or farmers market any raw milk or raw milk products produced as provided herein. Any person who violates the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not exceeding two hundred dollars ($ 200) or imprisonment in the county jail not to exceed three (3) months, or by both such fine and imprisonment. The director of the Idaho state department of agriculture may bring civil actions to enjoin violation of the provisions of this section.

(4) No producer of raw milk or raw milk products as provided in this section shall publish any statement that implies approval or endorsement by the Idaho state department of agriculture.

(5) The Idaho state department of agriculture is charged with the responsibility of administration and enforcement of this chapter and is empowered to promulgate and enforce rules not inconsistent with this chapter.

(6) The Idaho state department of agriculture is authorized to issue a hold order to stop the distribution of raw milk or raw milk products when it is deemed necessary to protect human health.

HISTORY: I.C., § 37-1101, as added by 2010, ch. 359, § 1, p. 944.

NOTES: CROSS REFERENCES. Department of agriculture, § 22-101 et seq.

PRIOR LAWS. Former chapter 11 of title 37 titled "Filled Milk", which comprised the following sections, was repealed by S.L. 1996, ch. 85, § 1, effective July 1, 1996:
§ 37-1101, which comprised S.L. 1923, ch. 37, § 1, p. 43; I.C.A., § 36-501; am. S.L. 1955, ch. 149, § 1, p. 296.
§ 37-1102, which comprised S.L. 1923, ch. 37, § 2, p. 43; I.C.A., § 36-502.
§ 37-1103, which comprised S.L. 1923, ch. 37, § 3, p. 43; I.C.A., § 36-503.
§ 37-1104, which comprised S.L. 1923, ch. 37, § 4, p. 43; I.C.A., § 36-504.

EFFECTIVE DATES. Section 2 of S.L. 2010, ch. 359 declared an emergency. Approved April 11, 2010.

TAB 29

North Dakota Century Code Annotated
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*** This document is updated through all acts signed by the governor as of March 21, 2017, with gaps of HB 1125, HB 1148, HB 1157, SB 2024, SB 2032, and SB 2129 from the 2017 Regular Legislative Session, not including changes and corrections made by the North Dakota Code Revisor. ***

TITLE 4 Agriculture
CHAPTER 4-30 Dairy Products Regulations

Go to the North Dakota Code Archive Directory

N.D. Cent. Code, § 4-30-41.4 (2017)

Legislative Alert: LEXSEE 2017 N.D. SB 2026 -- See section 13.

4-30-41.4. Shared animal ownership agreement -- Raw milk.

It is not a violation of this chapter to transfer or obtain raw milk under a shared animal ownership agreement. However, a person may not resell raw milk or raw milk products obtained under a shared animal ownership agreement.

HISTORY: S.L. 2013, ch. 68, § 6.

TAB 30

Michie's TM West Virginia Code
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*** Current through 2017 legislation effective March 31, 2017 ***

Chapter 19. Agriculture.
Article 1. Department of Agriculture.

GO TO WEST VIRGINIA STATUTES ARCHIVE DIRECTORY

W. Va. Code § 19-1-7 (2017)

§ 19-1-7. Shared animal ownership agreement to consume raw milk.

(a) Notwithstanding any other provision of the law to the contrary, a responsible party may enter into a written shared animal ownership agreement to consume raw milk in which he or she:

(1) Acquires a percentage ownership interest in a milk-producing animal;

(2) Agrees to pay another for the percentage ownership interest for the care and boarding of the milk-producing animal at the dairy farm;

(3) Is entitled to receive a fair share of the animal's raw milk production as a condition of the contractual agreement;

(4) Agrees to sign a written document acknowledging the inherent dangers of consuming raw milk that may contain bacteria, such as Brucella, Campylobacter, Listeria, Salmonella and E. Coli, that has not been pasteurized to remove bacteria and that is particularly dangerous to children, pregnant women and those with compromised immunity. The responsible party then agrees to release the herd seller of liability for the inherent dangers of consuming raw milk but not for those dangers that are caused by negligent acts or omissions of the herd seller; and

(5) Agrees not to distribute raw milk. The sale or resale of raw milk obtained from a herd share is strictly prohibited.

(b) The signed and executed shared animal ownership agreement shall be filed by the herd seller with the Commissioner of Agriculture and shall contain the names, addresses and phone numbers of the herd seller and the responsible party so that either party may be contacted in the event of an illness.

(c) The herd seller shall meet the animal health requirements for milk-producing animals established by the state veterinarian in accordance with state and national standards including the following:

(1) Raw milk from milk-producing animals intended for consumption shall be from a herd that tested negative within the previous twelve months for brucellosis, tuberculosis and other diseases as required by the state veterinarian. Additions to the herd shall test negative for the diseases within the previous thirty days before introduction into the herd; and

(2) Milk-producing animals producing bloody, stringy or abnormal milk, but with only slight inflammation of the udder, shall be excluded from the milking herd until reexamination shows that the milk has become normal. Milk-producing animals showing chronic mastitis, whether producing abnormal milk or not, shall be permanently excluded from the milking herd.

(d) Parties to a shared animal ownership agreement and physicians who become aware of an illness directly related to consuming raw milk shall report the illness to the local health department and the Commissioner of Agriculture. Upon receipt of such a report, the Commissioner of Agriculture or his or her designee shall contact and warn other parties consuming raw milk from the same herd seller.

(e) The Commissioner of Agriculture may impose an administrative penalty not to exceed $ 100 for a person who violates the provisions of this section. Any penalty imposed under this subsection may be contested by the person against whom it is imposed pursuant to article five [§§ 29A-5-1 et seq.], chapter twenty-nine-a of this code.

(f) The Commissioner of Agriculture, in consultation with the Department of Health and Human Resources, may propose rules for promulgation in accordance with the provisions of article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code in compliance with raw milk dairy industry standards.

HISTORY: 2016, c. 6.

NOTES: Effective dates. --

Acts 2016, c. 6, provided that the act take effect May 23, 2016.

Court File No.: CV-16-125250-00

THE REGIONAL MUNICIPALITY OF YORK, et al. -and- **MICHAEL SCHMIDT, et al.**

Applicants Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Newmarket

BRIEF OF AUTHORITIES OF THE APPLICANTS

(*Application for Injunction and Ancillary Relief*)

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