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British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Mr. Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

Re: FortisBC Inc. ("FBC") Rate Design and Rates for Electric Vehicle Direct Current Fast Charging Service Application - Final Submission

In accordance with the regulatory timetable in the above proceeding, we enclose for filing the Final Argument of FortisBC Inc., dated March 16, 2021.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Christopher Bystrom*
*Law Corporation

CRB/NR
Encl.

BRITISH COLUMBIA UTILITIES COMMISSION

FORTISBC INC.

RATE DESIGN AND RATES FOR ELECTRIC VEHICLE DIRECT CURRENT FAST CHARGING SERVICE APPLICATION

PROJECT NO. 1598940

FINAL ARGUMENT

OF

FORTISBC INC.

MARCH 16, 2020

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Part One: Introduction

1. FortisBC Inc. ("FBC") first filed for approval of an electric vehicle ("EV") charging rate on December 22, 2017 (the "Original Application").[1] In response to the Original Application, the British Columbia Utilities Commission ("BCUC") issued Order G-9-18 on January 12, 2018 approving an EV rate on an interim basis, directing FBC to exclude its EV charging stations from rate base, and adjourning the regulatory process. The BCUC then held a two-stage inquiry into the regulation of EV charging stations. In phase two of the inquiry, the BCUC focused on the role of "non-exempt public utilities" such as FBC. At the February 27, 2019 procedural conference, the BC Government's legal counsel stated that the BC Government "strongly supports investments in electric vehicle charging services by those non-exempt public utilities" and argued "it would be appropriate for non-exempt public utilities to recover those costs from ratepayers."[2] In its Phase Two Report, issued on June 24, 2019, the BCUC's recommendation to Government was that there may be circumstances that justify non-exempt utility ratepayers bearing the risk of EV infrastructure investments; however, it is in the public interest to ensure that the playing field remains as level as possible to ensure that non-exempt public utility investments do not crowd out exempt utility investment.[3]

2. Into this context, on June 22, 2020, the Lieutenant Governor in Council issued Order in Council 339, amending the Greenhouse Gas Reduction (Clean Energy) Regulation ("GGRR") to create a class of prescribed undertaking for a public utility's construction and operation, or purchase and operation, of eligible charging stations. Given this addition to the GGRR, section 18 of the *Clean Energy Act* ("CEA") imposes a statutory obligation on the BCUC to set rates that are sufficient to recover FBC's costs incurred on its EV charging stations that are prescribed undertakings. On its face, the clear and unambiguous purpose and effect of this legislation is to

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1 Exhibit B-1.

2 British Columbia Utilities Commission, An Inquiry Into The Regulation Of Electric Vehicle Charging Service, Phase Two Report, June 24, 2019, at p. 2. Online: https://www.bcuc.com/Documents/Proceedings/2019/DOC_54345_BCUC-EV-Inquiry-Phase2-Report.pdf.

3 British Columbia Utilities Commission, An Inquiry Into The Regulation Of Electric Vehicle Charging Service, Phase Two Report, June 24, 2019, p. i. Online: https://www.bcuc.com/Documents/Proceedings/2019/DOC_54345_BCUC-EV-Inquiry-Phase2-Report.pdf.

endorse and encourage the investment of non-exempt utilities in EV charging stations by requiring that their costs incurred be recovered in rates.

3. On September 30, 2020,[4] FBC filed an updated and revised application ("Revised Application"), in which FBC is seeking permanent approval of an updated EV charging rate and other related approvals grounded in the fact that FBC's existing and planned direct current fast charging ("DCFC") stations fall within the class of prescribed undertakings described in section 5 of the GGRR. During this proceeding, FBC has responded to two rounds of information requests ("IRs") in a complete and thorough manner. FBC has been open and transparent, and offered pragmatic solutions to the issues raised, including proposals for ongoing reviews of the performance of the proposed EV charging rates. FBC's proposed EV charging rates will reasonably recover FBC's cost of service of its eligible charging stations over the next 10 years, will encourage the use of the eligible charging stations, and are comparable to market-based rates.

4. Therefore, FBC submits that the BCUC should grant the following approvals pursuant to sections 52 and 59-61 of the UCA:

(a) Final approval of Rate Schedule (RS) 96 – Electric Vehicle Charging, attached as Appendix B to the Revised Application, including time-based rates of $0.26 per minute at FBC's 50 kW DCFC stations and $0.54 per minute at FBC's 100 kW stations,[5] to be effective within 30 days of the date of the BCUC's Order approving the rate.[6]

(b) Approval that Rate Schedule 96 shall not be subject to general rate increases, unless otherwise directed by the BCUC;

(c) Approval to include the assets associated with its eligible charging stations, and related revenues and expenses, in FBC's regulated accounts;

(d) Approval for FBC's proposed straight line 10 percent depreciation rate for FBC-owned EV DCFC stations;

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[4] Exhibit B-5.

[5] Rates are as amended in Exhibit B-16, BCUC IR2 20.6.

[6] Exhibit B-7, BCUC IR1 2.1.

(e) Approval to dispose of FBC's DCFC EV charging station in New Denver and DCFC EV charging station in Nakusp to BC Hydro.[7]

5. A draft final order is provided in Attachment 20.6C to Exhibit B-16.

6. In the following two parts of this submission, FBC first addresses topics related to the fact that FBC's DCFC stations are prescribed undertakings and then addresses its proposed EV charging rates.

Part Two: FEI's DCFC Stations as Prescribed Undertakings

7. This part of the submission addresses matters related to FBC's DCFC stations as prescribed undertakings. FBC first addresses the legal questions posed by the BCUC. Second, FBC shows how its DCFC stations meet the requirements of section 5 of the GGRR and are therefore prescribed undertakings. Third, FBC submits that the BCUC should approve the disposition of FBC's New Denver and Nakusp stations to BC Hydro. Fourth, FBC submits that, as prescribed undertakings, the assets and associated revenues and costs should now be included in FBC's regulated books.

A. Legal Interpretation Questions Posed by BCUC

(a) Principles of Statutory Interpretation

8. The CEA and the GGRR must be interpreted in accordance with the accepted principles of statutory interpretation. The leading case on statutory interpretation is *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27,[8] in which the Supreme Court of Canada relied on the following statement from Elmer Driedger in *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.

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[7] Exhibit B-7, BCUC IR1 17.9.

[8] Book of Authorities, Tab 6.

9. In *Sullivan on the Construction of Statut*es, the author explains further:[9]

> Under Driedger's modern principle, interpreters are obliged to consider the entire context of the text to be interpreted. As Driedger himself indicated, this includes the external context in its broadest sense.

10. The BCUC must also have regard to section 8 of the *Interpretation Act*, which states that every enactment must be interpreted remedially:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

11. Therefore, the BCUC must give section 18 of the CEA and section 5 of the GGRR a fair, large and liberal interpretation that best ensures the attainment of its objects.

12. As discussed in the introduction to this submission, on its face, the purpose and object of section 5 of the GGRR and section 18 of the CEA is to reduce GHG emissions in BC by encouraging public utilities to operate eligible charging stations by allowing public utilities to recover their costs incurred on such stations. The BCUC must interpret the legislation fairly, largely and liberally in order to attain this object. This point should be kept in mind when considering the responses to the four questions, as addressed below. As FBC submits below, many of the questions pose interpretations of the legislation that run contrary to both its plain meaning and purpose and, therefore, must be rejected.

(b) Question 1: Definition of Eligible Charging Site

> 1. Section 5(1) of the GGRR defines an "eligible charging site" as a site where one or more eligible charging stations are located; "limited municipality" as a municipality with a population of 9,000 or more; and "site limit" as the number calculated by dividing the municipality population by 9,000 and rounding the quotient up to the nearest whole number.
>
> **How should a "site" be interpreted for the purposes of determining a "site limit" within a "limited municipality"? For example, should there be any considerations regarding geographic location, location size, or number of fast**

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[9] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), p. 655 [Book of Authorities, Tab 9].

charging stations for a "site"? Can multiple electric vehicle (EV) charging service providers operate their fast charging stations under the same "site"?

13. Under section 5 of the GGRR, the eligible charging site is simply the place or location where one or more eligible charging stations are located. FBC has provided its working definition of a charging site as being "a contiguous area (e.g. a parking lot) for the provision of EV charging services."[10]

14. When interpreting legislation, reference should be made to the ordinary meaning of the words.[11] The online Cambridge Dictionary defines "site" as "a place where something is, was, or will be built, or where something happened, is happening, or will happen".[12] Miriam Webster defines "site" as "1a: the spatial location of an actual or planned structure or set of structures (such as a building, town, or monuments) b: a space of ground occupied or to be occupied by a building".[13] Based on this ordinary meaning of "site", an "eligible charging site" is simply the place or location where one or more charging stations are located.

15. When interpreting legislation, attention must also be placed on its purpose. When reading section 5 of the GGRR as a whole, it is apparent that the purpose of the definition of "eligible charging site" is to introduce the concept of location so that site limits on specific municipalities can be incorporated. Therefore, the key aspect of the "eligible charging site" is the municipality in which it is located, as this will determine the applicable "site limit" (if any). Other than determining the applicable "site limit" (if any), there is no other purpose of the definition of "eligible charging site".

16. With respect to the considerations noted by the BCUC:

(a) **Geographic location:** The only relevant aspect of the location of an eligible charging site is the municipality in which the site is located. This will determine which, if any, site limit is applicable to the charging station.

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[10] Exhibit B-7, BCUC IR1 3.6.

[11] "Site" is not a defined term in the *Interpretation Act*, R.S.B.C. 1996, c. 238.

[12] Cambridge Dictionary. Online: https://dictionary.cambridge.org/dictionary/english/site. Accessed March 16, 2021.

[13] Merriam-Webster Dictionary. Online: https://www.merriam-webster.com/dictionary/site. Accessed March 16, 2021.

(b) **Location size:** There is no limit on the size of an eligible charging site specified in section 5(1) of the GGRR. There is no basis to incorporate any limitation on size; nor is this an issue in this proceeding.

(c) **Number of stations for a site:** There is no limit on the number of stations that may be located at a site. The definition of "eligible charging site" states that there may be "one or more charging stations". There is no basis to incorporate a maximum number of sites; nor is this an issue in this proceeding.

(d) **Multiple EV Providers:** Multiple EV providers could operate stations at the same site, as there is no prohibition on this under section 5 of the GGRR. The definition simply refers to one or more eligible charging stations. Section 5 does not specify that all the eligible charging stations need to be operated by the same public utility. It also does not prohibit non-eligible charging stations from being located at the same site. As FBC is the only operator at its sites, and there is no plan for multiple operators at one site, this is not relevant to this proceeding.

17. FBC submits that it has correctly identified the municipalities in which each "eligible charging site" are located and applied the correct site limit, calculated in accordance with section 5 of the GGRR. None of FBC's eligible charging sites will exceed the site limit for the municipality in which they are located.[14]

(c) Question 2: Date that the Public Utility Decides to Construct or Purchase an Eligible Charging Station

2. Section 5(2)(b) of the GGRR states that an eligible charging station is a prescribed undertaking if "the public utility reasonably expects, on the date the public utility decides to construct or purchase an eligible charging station, that (i) the station will come into operation by December 31, 2025, and (ii) if the station will be located in a limited municipality, the number of eligible charging sites in the municipality on the date the station will come into operation will not exceed the site limit for the municipality on that date."

a. How should "on the date the public utility decides to construct or purchase an eligible charging station" be interpreted? What information should be used to determine when that date was? Should the utility be required to also determine the site where the eligible charging station will be located by that date?

[14] Exhibit B-5, Revised Application, p. 9.

18. FBC does not see any ambiguity in the words "on the date the public utility decides to construct or purchase an eligible charging station". Rather, it appears to FBC that the BCUC is inquiring into what evidence may be needed to show the date the public utility made the decision. The way a public utility decides to construct or purchase a charging station will likely vary from company to company, or from time to time, based on internal policies and procedures. Therefore, the nature of the evidence to demonstrate the date of the decision will vary depending on the public utility or circumstances related to the construction or purchase of an eligible charging station.

19. FBC has stated that it considers "the date the public utility decides to construct or purchase an eligible charging station" to be the date in which it enters into a financial commitment to purchase, construct or install the required charging station infrastructure for the eligible charging station.[15] While it is possible that a decision could have been made earlier, an executed and dated contract or letter of intent clearly demonstrates that a decision was made by the date of the contract or letter of intent.[16] This is true as authorization would be needed for an employee to sign the contract or letter on behalf of the utility.

20. The municipality in which the station will be located will be relevant to determining the applicable site limit, if any. Therefore, FBC expects that the contract or letter of intent will include information on the location of the site or sites of the eligible charging station(s).[17] However, it could be reasonable in some circumstances to indicate only the municipality in which the station will be located, with the exact location of the site to be determined.

21. FBC submits that it cannot be constrained in the type of evidence it could file to demonstrate a station meets the requirements of the GGRR. Therefore, if a contract or letter of intent did not include the requisite information regarding the municipality in which the station would be located, or other information, FBC could file other evidence to demonstrate how the station meets the GGRR requirements.

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[15] Exhibit B-7, BCUC IR1 3.8.

[16] Exhibit B-7, BCUC IR1 3.8.2.

[17] Exhibit B-16, BCUC IR2 18.1.

22. Furthermore, considering that FBC plans for all of its stations to come into operation by January 1, 2022,[18] it reasonable to expect that its stations will come into operation by December 31, 2025 and, based on existing and planned stations in each municipality, not exceed the site limit when they come into operation. Therefore, these evidentiary issues are not a concern for FBC's eligible charging stations.

b. Considering that there may be circumstances where it may not be known if an eligible charging station has met the criteria to be a prescribed undertaking until the station comes into operation, should the BCUC make a determination, on a forecast basis, of whether an eligible charging station is a prescribed undertaking? What are the advantages and disadvantages to the utility and its ratepayers of the BCUC making such a determination on a forecast basis?

23. FBC's response to this question involves the following five key points:

(a) The burden of proof on a party trying to demonstrate a fact in front of the BCUC is the balance of probabilities.

(b) Whether a planned DCFC station is a prescribed undertaking is like any other evidentiary issue that the BCUC considers: the burden of proof is a balance of probabilities; a BCUC determination is not required for a prescribed undertaking to be a prescribed undertaking.

(c) FBC has met the burden of demonstrating on a balance of probabilities that its DCFC stations are prescribed undertakings.

(d) To fulfill its statutory obligation under section 18 of the CEA, FBC submits that the BCUC should be setting rates to recover FBC's prescribed undertakings costs on a forecast cost of service basis, consistent with its usual practice.

(e) FBC's existing Flow-through deferral account will be used to capture all variances between forecast and actual cost/revenue associated with the its EV stations that are prescribed undertakings, so customers will pay only actual costs of the stations.

[18] Exhibit B-7, BCUC IR1 4.1.

24. First, the burden of proof on a party trying to demonstrate a fact in front of the BCUC is the balance of probabilities, meaning more likely than not.[19] This is the burden of proof in civil cases generally. Imposing a higher standard of proof would be an error of law and violate section 18(3) of the CEA, which states that the BCUC should not be doing anything directly or indirectly to prevent a pubic utility from carrying out a prescribed undertaking.

25. Second, whether a planned DCFC station is a prescribed undertaking is like any other evidentiary issue that the BCUC considers. The fact that there is a legal element to determining whether a DCFC station is a prescribed undertaking does not increase the burden of proof on FBC. Furthermore, the GGRR sets out what a prescribed undertaking is, and neither the CEA nor the GGRR require a BCUC determination for a prescribed undertaking to be a prescribed undertaking. Rather, the BCUC's mandate is to set rates to recover the costs of prescribed undertakings. To fulfill that mandate, the BCUC must consider whether FBC's DCFC stations are or will be prescribed undertakings on a balance of probabilities. If they are, then the BCUC must exercise its jurisdiction under the UCA in accordance with section 18 of the CEA.

26. Third, FBC has conclusively met the burden of demonstrating on a balance of probabilities that its DCFC stations are prescribed undertakings, as discussed below in this submission. FBC is in control over how it constructs and operates or purchases and operates its DCFC stations and intends to meet the requirements of section 5 of the GGRR, as this will ensure that it will be able to recover its costs. The requirements of section 5 of the GGRR are not particularly complex, and there is no reason to believe that FBC's DCFC stations will not be prescribed undertakings.

27. Fourth, the BCUC has a statutory obligation under section 18 of the CEA to set rates that recover the utility's costs incurred on prescribed undertakings. To fulfill this obligation, FBC submits that the BCUC should be setting rates to recover FBC's prescribed undertakings costs on a forecast cost of service basis consistent with its usual practice. Public utilities have the burden of showing, on a balance of probabilities, what their costs will be each year in respect of

[19] Robert W. Macaulay, James L.H. Sprague & Lorne Lossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2019), at Chapter 17.2 [Book of Authorities, Tab 7].

their prescribed undertakings. In this proceeding, FBC has proposed EV charging rates that will reasonably recover its forecast cost of service over a 10-year levelized basis. Further, each year in its annual reviews, FBC will provide a forecast of its costs of its prescribed undertakings.[20] These processes will allow the BCUC to fulfill its statutory obligation to set rates that recover FBC's costs incurred on its prescribed undertakings.[21]

28. Fifth, to address any concerns about variances from forecast, the BCUC has the jurisdiction to create a deferral account to capture variances from forecast so that customers only pay for the actual costs of prescribed undertakings. FBC's existing Flow-through deferral account will be used to capture all the variances between forecast and actual cost/revenue associated with the EV stations over the term of FBC's multi-year ratemaking plan ("MRP").[22]

29. FBC's Flow-through deferral account would address the situation where a station was found not to be a prescribed undertaking once it came into operation. FBC explained:[23]

> In the unlikely scenario that an EV station included in FBC's revenue requirement was subsequently found not to meet the criteria to be a prescribed undertaking, the differences between the forecast of cost/revenue (non-zero) and actual cost/revenue (zero) will be accounted for in the Flow-through deferral account. When determining FBC's revenue requirement at each annual review, the opening balance of the Flow-through deferral account will be trued-up to the actual prior year balance, similar to all other deferral account balances, resulting in the actual variances from prior years being returned to/recovered from customers through amortization of the deferral account into rates.

30. However, FBC intends to construct or purchase eligible charging stations that meet the requirements of the GGRR, so the above situation is not expected.

31. In summary, to meet its statutory obligation under section 18 of the CEA, FBC submits that the BCUC should approve rates that recover FBC's forecast costs on its prescribed undertakings.

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[20] Exhibit B-16, BCUC IR2 18.4.

[21] Exhibit B-16, BCUC IR2 18.4.

[22] Exhibit B-16, BCUC IR2 18.5.

[23] Exhibit B-16, BCUC IR2 18.5.

(d) Question 3: GGRR Includes Stations in Operation Prior to June 22, 2020

> 3. The GGRR was amended on June 22, 2020 to include EV charging stations as a prescribed undertaking. FBC submits that section 18 of the CEA and section 5 of the GGRR have a "retrospective" effect, "as they require the recovery of the costs of all charging stations that come into operation by December 31, 2025, which by definition includes stations in operation prior to June 22, 2020."
>
> **a. Does section 5 of the GGRR include fast charging stations that came into operation prior to June 22, 2020 as a prescribed undertaking on a retrospective basis? Why or why not?**

32. Section 18 of the CEA and section 5 of the GGRR require that the BCUC set rates to recover the cost of eligible charging stations that came into operation prior to June 22, 2020.

Plain Meaning of Legislation Clearly Requires Recovery of Costs

33. Read in their grammatical and ordinary sense, there is no ambiguity in the words of section 18 of the CEA or section 5 of the GGRR. Section 18 of the CEA imposes an obligation on the BCUC to set rates that are sufficient for public utilities to recover their "costs incurred" on prescribed undertakings, which are defined in section 5 of the GGRR to include eligible charging stations "the public utility constructs and operates, or purchases and operates" and reasonably expects to come into operation "by December 31, 2025." A public utility's eligible charging station that came into operation prior to June 22, 2020 fits squarely within the class of prescribed undertakings described in section 5 of the GGRR. Therefore, section 18 of the CEA requires rates to be set that allow public utilities to recover their costs incurred on those stations. There are no words in the legislation that exclude stations that came into operation prior to June 22, 2020.

34. Further, it is harmonious with the scheme, object and purpose of the legislation to allow cost recovery of stations that came into operation prior to June 22, 2020. The context into which section 5 of the GGRR was enacted was as follows:

(a) in 2017, the BCUC directed FBC to hold its EV stations outside rate base until directed otherwise,

(b) the BCUC then initiated a two-phase Inquiry into the Regulation of Electric Vehicle Charging Service;

(c) at a February 27, 2019 procedural conference, the BC Government's legal counsel stated that the BC Government "strongly supports investments in electric vehicle charging services by those non-exempt public utilities" and argued "it would be appropriate for non-exempt public utilities to recover those costs from ratepayers";[24]

(d) in June 2019, the BCUC made recommendations to government regarding the regulation of EV charging service undertaken by non-exempt public utilities; and

(e) from 2017 to the present, non-exempt public utilities such as FBC proceeded with investments in DCFC stations in advance of the Province responding to the BCUC's recommendations and legislating in this area.

35. In this context, the remedial purpose of section 5 of the GGRR is to ensure that public utilities will recover their investment in eligible charging stations. On its face, the object of section 5 of the GGRR and section 18 of the CEA is to endorse and encourage the actions of public utilities to invest in eligible charging stations in order to reduce greenhouse gas emissions in B.C. Therefore, an interpretation that denies cost recovery of stations that came into operation prior to June 22, 2020 would go directly against the remedial purpose and object of the GGRR and CEA, and would therefore be unreasonable.

36. Given the clear and unambiguous wording of section 18 of the CEA and section 5 of the GGRR, no further analysis is required to conclude the cost of eligible charging stations that came into operation prior to June 22, 2020 must be recovered in rates.

There is No Retrospective Effect

37. Based on further analysis of the effect of section 5 of the GGRR and section 18 of the CEA, FBC submits that they do not have a retrospective effect: the fact that they require the recovery of the costs of eligible charging stations that came into operation prior to June 22, 2020 is not properly characterized as a retrospective effect. The Court in *Chesterman Farm Equipment Inc. v CNH Canada Ltd.*, 2016 ONSC 698, stated at para. 99: "It is well-established that a statute with retrospective effect is one that takes away or changes tangible rights that

[24] British Columbia Utilities Commission, An Inquiry Into The Regulation Of Electric Vehicle Charging Service, Phase Two Report, June 24, 2019, at p. 2. Online: https://www.bcuc.com/Documents/Proceedings/2019/DOC_54345_BCUC-EV-Inquiry-Phase2-Report.pdf.

have vested in a party."[25] [Emphasis added.] The authorities also similarly describe retrospective legislation as imposing "prejudicial consequences" on a "past event" or "completed transaction".[26] In contrast, the effect of section 5 of the GGRR and section 18 of the CEA is to impose an obligation on the BCUC in respect to the exercise of its powers under the UCA going forward. Namely, the BCUC must set rates to allow public utilities to recover their cost incurred with respect to eligible charging stations. The right of a public utility to operate charging stations that came into operation prior to June 22, 2020 has not changed. Nor does the legislation impose prejudicial consequences on the operation of such stations. Furthermore, FBC's charging stations that came into operation prior to June 22, 2020 are continuing to operate.

38. In the case of *A.G. Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, the provisions for abandoning an expropriation were changed after the commencement of an expropriation. The Supreme Court of Canada held that the amendments did not operate retrospectively as they did not seek to affect any completed past transactions, but instead applied only to the ongoing expropriation process. As observed by the B.C. Court of Appeal in *Krangle (Guardian ad litem of) v. Brisco*, 2000 BCCA 147 at 56: 'In essence, if the relevant facts with which a provision is concerned are not all in the past, the application of the provision, when it is enacted, is "immediate" as opposed to "retrospective".' FBC's eligible charging stations are not "all in the past," but are assets that FBC continues to operate. Section 18 of the CEA and section 5 of the GGRR simply require the BCUC to set rates that allow FBC to recover the costs of its eligible charging stations. This is not a retrospective effect in the legal sense.

In the Alternative, Presumption Against Retrospectivity Does Not Apply

39. In the alternative, if there is a retrospective effect, the presumption against retrospectivity could not apply in this case because section 5 of the GGRR and section 18 of the

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[25] *Chesterman Farm Equipment Inc. v CNH Canada Ltd.*, 2016 ONSC 698, at para. 99 [Book of Authorities, Tab 3]; see also *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 SCR 271, at pp. 279-284 [Book of Authorities, Tab 4].

[26] E.g., Driedger, *Construction of Statutes*, 2nd Edition: "A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction." As cited in *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)*, 2003 BCCA 436, at p. 57 [Book of Authorities, Tab 1].

CEA are not prejudicial, but confer a benefit. As stated succinctly by the Supreme Court of Canada in *Brosseau v. Alberta Securities Commission*, 1989 CanLII 121 (SCC): "The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit."

40. According to Dreidger, the presumption against retrospectivity does not apply:[27]

1. unless the consequences attaching to the prior event are prejudicial; or
2. if the statute is prejudicial but has effects that are intended to protect the public.

41. An example of a prejudicial consequence would be new or harsher criminal charges to be applied to an action. The presumption against the retrospective effect of statutory provisions that have a prejudicial effect is to avoid the arbitrariness, unfairness, or surprise created by such statutes – for example, where a person who is surprised when their past actions, previously legal in all respects, become criminal due to a statute with retrospective effect. Where the statutory provision is beneficial, there is no similar concern with arbitrariness, unfairness or surprise.

42. Thus, the presumption against retrospectivity does not apply here because section 18 of the CEA and section 5 of the GGRR are not prejudicial, but confer a benefit. By creating a new class of prescribed undertaking, the legislature is encouraging public utilities such as FBC to invest resources in the development of EV charging stations. This does not raise any concerns with arbitrariness, unfairness or surprise that the presumption against retrospectivity is meant to avoid.

In the Further Alternative, Presumption Against Retrospectivity Is Rebutted

43. In the further alternative, even if the presumption against retrospectivity were held to apply to section 5 of the GGRR, such a presumption may be rebutted: (i) where a statue expressly states that the provision has retrospective effect; or (ii) where this effect is apparent

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[27] Ibid., Ruth Sullivan, Statutory Interpretation, 3rd ed (Toronto: Irwin Law, 2016), at p. 359 [Book of Authorities, Tab 8].

by necessary implication.[28] The wording of the CEA and GGRR supports the presumption against retrospectivity being rebutted for the following reasons:

(a) First, section 18 of the CEA applies to costs "incurred" by a public utility without temporal restriction, indicating that its scope extends to past events – including costs incurred prior to June 22, 2020. This clearly authorizes any retrospective effect of section 5 of the GRR.

(b) Second, section 5 of the GGRR limits the definition of the class of prescribed undertaking by requiring that charging stations come into operation by December 31, 2025. This clearly indicates an intent to include charging stations that came into operation before the regulation came into force.

(c) Third, the purpose of section 18 of the CEA and section 5 of the GGRR is to encourage investment from public utilities in electric vehicle charging stations. An interpretation that would result in the non-recovery of the costs incurred on many of the charging stations owned by FBC, as well as many stations owned by BC Hydro, would fundamentally undermine this purpose and is therefore not a reasonable interpretation of the legislation.

44. In conclusion, FBC submits that section 18 of the CEA and section 5 of the GGRR require the BCUC to set rates that recover the costs of eligible charging stations that came into operation prior to June 22, 2020.

b. In the case of a station that needed to be upgraded to meet the criteria to be a prescribed undertaking, what portion of the total capital cost of the upgraded station should be allowed into a public utility's rate base? For instance, would this be the entire cost of the upgraded station less accumulated depreciation, or only the incremental investment portion for the upgrade? Please provide reasons in support.

45. FBC does not have any stations that need to be upgraded to meet the criteria in section 5 of the GGRR. Therefore, this question is a hypothetical circumstance that has no bearing in this proceeding.

46. Nonetheless, FBC submits that once a station meets all the criteria to be considered a prescribed undertaking, all the costs incurred with respect to the station are recoverable in rates. This is because the entire station (not just the upgrade) would be a prescribed

[28] See, for example, *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 SCR 271, at p. 279 [Book of Authorities, Tab 4].

undertaking. Section 18 of the CEA requires the BCUC to set rates to allow the public utility to recover its costs incurred with respect to its eligible charging stations that are prescribed undertakings.

47. In FBC's submission, there is no reasonable foundation for an opposing interpretation. There are no words in the GGRR or section 18 of the CEA that suggest that only an upgrade would be recoverable in rates. Further, such an interpretation would run counter to the purpose of section 5 of the GGRR and section 18 of the CEA to encourage public utilities to construct or purchase DCFC EV charging stations to reduce GHG emissions. An interpretation that would seek to restrict cost recovery to only an incremental investment to upgrade a station would discourage public utility participation in this area and lead to increased GHG emissions. FBC submits it would be an error of law to find that anything less than all costs with respect to a prescribed undertaking are recoverable in rates.

(e) Question 4: All Cost Component Must be Recovered

> 4. Section 18(2) of the CEA provides that the BCUC "must set rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking." Section 18(3) of the CEA also provides that the BCUC "must not exercise a power under the Utilities Commission Act in a way that would directly or indirectly prevent a public utility… from carrying out a prescribed undertaking."
>
> **Should all cost components of an eligible charging station be eligible for recovery under the GGRR (for example, paving costs, lighting installation and maintenance costs, washroom facilities, wheelchair accessible ramps)? Why or why not? If reasonable limits on cost recovery are required, how should they be determined and why?**

48. The BCUC must set rates that allow public utilities to recover all cost components of an eligible charging station.

49. The key words in section 18 of the CEA that are relevant to this question are "costs incurred <u>with respect to</u> the prescribed undertaking". [Emphasis added.] The words "with

respect to" are very broad, being synonymous with "having to do with"[29] or "in connection with".[30]

50. In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743 (paras. 15-17), the Supreme Court of Canada interpreted the phrase "with respect to" very broadly, as follows:[31]

> 15 On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.
>
> 16 This reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 39:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]
>
> 17 We can assume that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's *prima facie* case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants.

51. Consistent with Supreme Court of Canada's determination, the words "with respect to" in section 5 of the GGRR are words of the widest possible scope: all costs relevant or rationally connected to the prescribed undertakings must be recovered in rates. This naturally includes such things as paving costs, lighting installation, and maintenance costs, washroom facilities,

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[29] Merriam-Webster. Online: https://www.merriam-webster.com/thesaurus/with%20respect%20to. Accessed 6 March 2021.

[30] Dictionary.Cambridge. Online: https://dictionary.cambridge.org/dictionary/english/in-respect-of-sth. Accessed 6 March 2021.

[31] Book of Authorities, Tab 2.

and wheelchair accessible ramps. All of the items are – or could be - relevant or rationally connected to the eligible charging stations.

52. With respect to items such as paving costs, FBC has committed to making its stations more accessible.[32] Investments to make a charging station more accessible for persons with disabilities have a clear and rational connection with the stations as they are physically connected to it and an important aspect of providing the service. These are clearly costs incurred "with respect to" eligible charging stations and therefore must be recovered in rates.

53. FBC does not have any washroom facilities at its current and planned sites, so the recovery of the costs of such facilities is not at issue in this proceeding or for FBC generally. However, it is possible that washroom facilities could be "with respect to" an eligible charging station. For example, operators could be mandated to provide such facilities, or it could come to be expected by the public that operators provide such facilities given they may be spending some amount of time waiting for their cars to be charged.

54. In FBC's submission, the BCUC should not be seeking to rule out in advance any type of cost from recovery, but rather must consider on the evidence before it whether costs are in respect of a prescribed undertaking. As explained above, all costs rationally connected to the prescribed undertaking must be recovered in rates.

B. FBC's DCFC Stations are Prescribed Undertakings

55. In this section, FBC describes how its DCFC stations are prescribed undertakings within the class of prescribed undertakings set out in section 5 of the GGRR. FBC submits the following:

(a) FBC's DCFC stations are "eligible charging stations."

(b) FBC will construct and operate or purchase and operate the eligible charging stations.

[32] Exhibit B-13.

(c) FBC reasonably expected that its DCFC stations will come into operation by December 31, 2025.

(d) FBC reasonably expected that its DCFC stations will not exceed the limited municipality site limits.

(e) Although not required, FBC's stations will be configured to use open charge point protocol.

(a) FBC DCFC Charging Stations Are Eligible Charging Stations

56. Each of FBC's 40 DCFC stations is an "eligible charging station", which is defined in section 5(1) of the GGRR to mean "a fast charging station that (a) is available for use 24 hours a day by any member of the public, (b) does not require users to be members of a charging network, and (c) is capable of charging electric vehicles of more than one make". A "fast charging station" is defined in section 5(1) of the GGRR to mean a fixed device capable of charging an electric vehicle using a direct current.

57. Each FBC station is a DCFC (direct current fast charging) station that:[33]

(a) is available for use 24 hours a day by any member of the public;

(b) does not require users to be members of a charging network: support is provided for FLO Services Inc. (FLO), Chargepoint, BC Hydro, Electric Circuit, and eCharge membership or customers can pay by mobile phone; and

(c) is capable of charging electric vehicles of more than one make: currently, every make/model of electric vehicle with DC fast charging capability will be able to charge at the FBC DCFC stations.

(b) FBC Will Construct/Purchase and Operate the Eligible Charging Stations

58. FBC's 40 DCFC stations satisfy the criteria in section 5(2)(a) of the GGRR that "the public utility constructs and operates, or purchases and operates, an eligible charging station". FBC will own all of the stations (either by construction or purchase[34]) and will operate all its stations.[35]

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[33] Exhibit B-5, Revised Application, p. 8; Exhibit B-8-1, BCOAPO IR1 5.1.

[34] Exhibit B-5, Revised Application, p. 3: FBC will be purchasing the stations at the Keremeos and Princeton sites from BC Hydro. An acquisition for valuable consideration, such as equivalent charging stations, is a purchase.

(c) Stations Reasonably Expected to Come into Operation by December 31, 2025

59. FBC's 40 DCFC stations meet the requirement of section 5(2)(b)(i) of the GGRR, which requires that "the public utility reasonably expects, on the date the public utility decides to construct or purchase an eligible charging station, that (i) the station will come into operation by December 31, 2025". FBC considers that an electric vehicle charging station has "come into operation" on the date when it is first available for use by the general public.[36]

60. At the time of the Revised Application, FBC had 23 eligible charging stations in operation. As these stations are already in operation, FBC reasonably expected that they would come into operation by December 31, 2025.

61. At the time of the Revised Application, FBC had 17 planned eligible charging stations. FBC expects all these planned DCFC stations and sites to come into operation by January 1, 2022.[37] FBC is confident it can achieve its current project schedule based on its experience with DCFC deployments to date. Although additional site and/or scope changes could potentially delay some deployments, FBC has not identified any obstacles that could reasonably delay FBC's planned stations from coming into operation by January 1, 2022.[38] Therefore, FBC reasonably expected that these stations will come into operation by December 31, 2025.

(d) Stations Reasonably Expected to Meet the Limited Municipality Site Limit

62. FBC's 40 DCFC stations meet the requirement of section 5(2)(b)(ii) of the GGRR, which requires that "the public utility reasonably expects, on the date the public utility decides to construct or purchase an eligible charging station, that…(ii) if the station will be located in a limited municipality, the number of eligible charging sites in the municipality on the date the station will come into operation will not exceed the site limit for the municipality on that date."

See *Frontier Construction & Development Ltd.*, [1970] 12 DLR (3d) 410 for judicial consideration of the meaning of purchase [Book of Authorities, Tab 5].

35 Exhibit B-5, Revised Application, p. 8.

36 Exhibit B-7, BCUC IR1 5.1. FBC considers that an electric vehicle charging station has "come into operation" on the date when it is first available for use by the general public.

37 Exhibit B-7, BCUC IR1 4.1.

38 Exhibit B-7, BCUC IR1 4.1.

63. Only six of FBC's eligible charging sites are located in a "limited municipality" and therefore only these 6 stations are subject to a "site limit".[39] Three of these sites are located in Kelowna, one is located in Nelson and two planned sites are in Penticton.[40] The following table details the count of non-exempt utility sites (existing and planned) as well as exempt utility sites (existing and planned), and shows that the site limit for the municipalities is not exceeded.[41]

Sites in Limited Municipalities[42]

Municipality	Population (2016 Census)	Non-exempt utility site count (current)	Non-exempt utility site count (planned)	Exempt utility site count (current)	Exempt utility site count (planned)	Total existing & planned sites	Site Limit (2016 Census Pop./ 9,000)
Kelowna	142,146	3	0	2	0	5	16
Penticton	43,432	0	2	0	1	3	5
Nelson	10,664	1	0	0	0	1	2

64. FBC has considered any planned or operating charging sites to be an "eligible charging site" for the purposes of enumerating charging sites and comparing to the site limit of a limited municipality.[43] FBC reasonably determines the number of operational and planned eligible charging sites by reference to Plugshare, NRCan's listing of NRCan-funded projects, and through its connection process for customers requesting service extensions and/or upgrades.[44]

65. FBC's use of published census data to determine the population of a "limited" municipality is reasonable as it is an authoritative source and uses consistent measures across municipalities. Municipalities may or may not have more recent or accurate data, and there is no indication that such data would change the result. Notably, Castlegar and Trail are the only two municipalities that are close to the 9,000 threshold for being a "limited municipality" and

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[39] Exhibit B-5, Revised Application, p. 9. The remaining sites in are all located in municipalities with populations less than 9,000, or the site is located in a community that is not a municipality as defined by the Community Charter.

[40] FBC completed the transaction on October 1, 2020 and currently owns and operates this site in Penticton. Exhibit B-8-1, BCOAPO IR1 6.6.

[41] Exhibit B-5, Revised Application, Table 2-1.

[42] Exhibit B-5, Revised Application, Table 2-1. Exhibit B-8-1, BCOAPO IR1 6.6.

[43] Exhibit B-7, BCUC IR1 3.7.1.

[44] Exhibit B-7, BCUC IR1 3.7.

populations listed on the website of these municipalities do not exceed 9,000. In any case, even if these municipalities were above the threshold, FBC's single site in each of these municipalities would not exceed the site limit.[45]

(e) FBC's Stations Will Be Configured to Use Open Charge Point Protocol

66. The GGRR requires that any eligible charging station coming into operation on or after January 1, 2022 use or be configured to use the Open Charge Point Protocol (OCPP). While FBC expects all its planned stations to come into operation prior to January 1, 2022, all of its charging stations (both current and planned) will be configured to use the OCPP.[46]

C. Approval to Dispose of FBC's DCFC Stations in New Denver and Nakusp to BC Hydro

67. FBC submits that the BCUC should approve FBC's disposition of two charging stations (one in New Denver and one in Nakusp) pursuant to section 52 of the UCA. FBC is transferring the two stations to BC Hydro in a like-for-like exchange for stations in Keremeos and Princeton.[47] FBC will transfer only the charging stations themselves between the sites. All other equipment will remain as installed at the existing sites with ownership transferred to FBC/BCH as part of the transaction.[48] FBC will secure no-cost Licences of Occupation for both sites prior to proceeding with the station swap.[49]

68. FBC and BC Hydro are exchanging these sites as it is more efficient for each utility to operate stations located in closer proximity to the areas served by the utility operating the station. This is due to the proximity of local crews and contract resources who may be required to provide disconnects/reconnects to facilitate work, conduct maintenance and repairs, or to help triage any unanticipated failures or interruptions in charging service.[50]

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[45] Exhibit B-8-1, BCOAPO IR1 6.2.

[46] Exhibit B-5, Revised Application, p. 9.

[47] Exhibit B-5, Revised Application, pp. 3 and 10.

[48] Exhibit B-6, BCUC IR1 17.1

[49] Exhibit B-8-1, BCOAPO IR1 1.3.

[50] Exhibit B-7, BCUC IR1 17.2.

69. The parties are endeavoring to complete this transaction on a "like-for-like" basis such that no additional compensation is required from either party.[51] FBC has constructed the New Denver and Nakusp sites to BC Hydro's existing standards for DCFC sites, including the installation of sufficient capacity to support the install of a second station at both of these locations. Similarly, BC Hydro will responsible for the costs of upgrades to the Keremeos and Princeton stations to support the installation of a second station at both locations.[52]

70. The BCUC actively regulates both FBC and BC Hydro and can be confident each will carry on service at their respective stations. FBC submits that the disposition is in the public interest and should be approved. FBC will not transfer the stations prior to BCUC approval.[53]

D. Eligible Charging Stations, and Related Revenues and Expenses, To Be Included in FBC's Regulated Accounts

71. As FBC's DCFC charging stations are prescribed undertakings, FBC submits that the BCUC must approve the recovery of FBC's investments in its DCFC charging stations. Therefore, FBC submits that BCUC should approve the inclusion of FBC's assets associated with its DCFC charging stations, and related revenues and expenses, in FBC's regulated accounts.

72. Order G-9-18 directed FBC "to separately track and account for all costs associated with the DCFC stations and exclude all such costs from its utility rate base until the Commission directs otherwise." Accordingly, since 2018, FBC's capital costs associated with existing stations have been held outside rate base, and FBC has accounted for related expenses and revenues in its non-regulated books. To the end of 2020, the cost of service net of revenues for these assets is a $74 thousand credit.[54] Following approval of this Revised Application, FBC will reflect the assets associated with the EV charging stations, and related revenues and expenses, in its regulated accounts. FBC will add the existing stations to its rate base on the actual date the Revised Application is approved by the BCUC. In its Annual Review for 2022 rates, FBC will

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[51] Exhibit B-7, BCUC IR1 17.5.

[52] Exhibit B-7, BCUC IR1 17.1

[53] Exhibit B-16, BCUC IR2 23.1.

[54] Exhibit B-7, BCUC IR 1.15.2.

propose a method (such as through its Flow-through deferral account) to recover its 2018 to 2020 net revenue/costs associated with its EV charging stations.[55]

73. FBC will account for the costs and revenues associated with the DCFC stations when setting rates for the test year starting in 2022. Starting with the Annual Review for 2022 Rates, FBC will include the costs and revenues associated with the EV stations in its forecast of rate base, O&M, and revenue.[56] As part of its Annual Review of rates, FBC will provide information regarding the actual and planned addition of DCFC stations, and sufficient information for the BCUC to assess whether any future stations not included in FBC's Revised Application meet the criteria to be a prescribed undertaking under the GGRR.[57] Any variances between forecast and actual costs of the prescribed undertakings will be captured in the Flow-through deferral account to be returned to or recovered from customers. As a result, FBC's customers will only pay for FBC's actual cost incurred on its DCFC charging stations that are prescribed undertakings.[58]

Part Three: FEI's Proposed EV Charging Rates are Just and Reasonable

74. FBC is requesting final approval of RS 96 – Electric Vehicle Charging, which includes two rates for its DCFC EV stations:

(a) a time-based rate of $0.26 per minute at FBC's 50 kW DCFC stations, and

(b) a time-based rate of $0.54 per minute at FBC's 100 kW stations.

75. FBC requests approval of a 10-year straight line depreciation rate for its eligible charging stations. FBC is also requesting an Order in this proceeding that RS 96 will be exempt from general rate changes unless otherwise directed by the BCUC.

76. FBC's proposed RS 96 is attached as Appendix B to the Revised Application. Please refer to Exhibit B-16, Attachment 20.5A for the updated electricity cost schedules for the 50 kW

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[55] Exhibit B-7, BCUC IR1 15.2 and 15.2.1.

[56] Exhibit B-7, BCUC IR1 15.1.2.

[57] Exhibit B-7, BCUC IR1 16.2.

[58] Exhibit B-16, BCUC IR2 19.1.

stations and Exhibit B-16, Attachment 20.5B for the updated electricity cost schedules for the 100 kW stations.

77. In the sections below, FBC makes the following points:

(a) Energy-based rates cannot be implemented at this time.

(b) The proposed rates will recover FBC's forecast cost of service on its eligible charging stations over a 10-year period.

(c) The proposed rates are comparable to market rates.

(d) Exempting the proposed rates from general rate changes is just and reasonable.

(e) FBC is proposing that RS 96 would be subject to periodic review.

(f) Levelized rates are consistent with the requirements of section 18(2) of the CEA.

(g) The proposed rates are supported by rate design principles.

(h) An idling fee is not necessary at this time.

(i) FBC will address accessibility concerns.

A. Energy-Based Rates Cannot Be Implemented at this Time

78. Rates based in whole or in part on energy use (kWh) cannot be implemented due to the lack of Measurement Canada-approved metering. Using metering devices that are not accredited by Measurement Canada for customer billing purposes would violate section 9 of the *Electricity and Gas Inspection Act*, R.S.C., 1985, c. E-4. Therefore, FBC is limited in the options available for EV rates at this time.

79. Measurement Canada has recently stated that it expects to allow-energy based rates within the next 18 months:[59]

> **What are we doing to allow kilowatt-hour billing?**
>
> In the next 18 months, we expect to allow existing and new electric vehicle (EV) charging stations that meet established technical standards to charge based on

[59] Exhibit B-18, BCSEA-VEVA IR2 10.1.

> kilowatt-hours (kWh) consumed. We will do this by continuing to work closely with industry and monitoring requirements other countries are developing, as well as advances and innovations in EV charging station technologies. The requirements will be performance-based to minimize costs and regulatory burden for EV charging station operators, while ensuring consumers receive accurate and reliable measurement, and protection against unfair practices.
>
> We will also work with EV charging station operators to evaluate EV charging stations at their installation site under typical conditions of use. If these stations meet the technical standards, they will be approved to charge for electricity based on kWh.

80. When Measurement Canada approved metering becomes available, FBC will examine the potential to offer wholly or partially energy-based rates, including whether there are any other impediments to implementing such rates.[60]

B. Proposed Rates Will Recover FBC's Cost of Service on Eligible Charging Stations

81. FBC's proposed rates are based on a cost of service analysis of its eligible charging stations and assume a reasonable level of use based on FBC's experience with its existing stations and projected growth in sales of EVs in BC over the next 10 years. Using a levelized approach results in an EV charging rate that is flat over the 10-year period. Having a flat rate over the analysis period, rather than a rate that follows the cost of service profile, will provide for stable and consistent rates for EV charging customers.

82. The key assumptions used by FBC in its cost of service model are reasonable:

(a) **Charging Events Per Day:** FBC has assumed consumption of 20 kWh per charge event based on average historical kWh volumes per charge session at FBC's existing stations.[61]

(b) **Station Usage:** FBC modeled EV charging usage by establishing a baseline using historical data and then applying growth rates based on the sales target in the Zero Emissions Vehicle Act Regulations Intentions Paper.[62] Although FBC's

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[60] Exhibit B-7, BCUC IR1 7.7.

[61] Exhibit B-5, Revised Application, p. 13. See Exhibit B-17, BCOAPO IR2 31.2 for the values and methodology that FBC used to calculate the number of charging events.

[62] Exhibit B-7, BCUC IR1 8.4. See Exhibit B-17, BCOAPO IR2 31.1 for the values and methodology that FBC used to calculate the EV growth rates within its electric service territory.

stations have only been in operation since 2018, the growth in EV registrations to date has been comparable to the growth in station usage.[63]

(c) **Inflation Rates:** FBC updated the inflation of electricity costs for FBC's approved rates for 2020 and 2021.[64] FBC then applied an indicative rate increase of 3.5% for each of the years 2022-2024.[65] A 2% inflation is used in the remaining years in line with the Bank of Canada historical inflation target of 2%,[66] and the provincial Government's forecast.[67]

(d) **Carbon Credits:** FBC has included a forecast of revenue from carbon credits sales under the *Renewable and Low Carbon Fuel Requirements Regulation*.[68] FBC has forecast $200/credit, which represents a conservative approach given the average carbon credit price has exceeded the $200/credit penalty that fuel suppliers are required to pay to become compliant under the RLCFRR.[69] Actual revenue from FBC's sale of the credits will be treated as Other Revenue.[70]

(e) **Transaction Fees:** FBC's has included the transaction fee of 15 percent for global management services charged by FLO, which covers station status monitoring, remote diagnostics and upgrades, data storage, and payment processing, collection and accounting services.[71]

83. FBC's cost of service inputs are also reasonable:

(a) **Capital Expenditures and Contributions**: FBC included its actual capital costs of $3.48 million and forecast capital costs of $1.69 million in 2021. FBC has also included contributions-in-aid of construction of $2.97 million, including $1.27 million received to date, which is expected from numerous partners including Natural Resources Canada, the Province of B.C., the Community Energy Association through funding from the Columbia Basin Trust, the federal government, and various municipal governments who support the construction of the stations. FBC has also included its repayment obligations to Natural Resources Canada.[72] FBC corrected the timing of capital spending that was shown as occurring after 2025 and should have been shown as beginning in

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63 Exhibit B-7, BCUC IR1 8.4.1. Also see Exhibit B-10, CEC IR1 12.2 and 12.2.1.

64 Exhibit B-5, Revised Application, p. 13.

65 Exhibit B-5, Revised Application, p. 13.

66 Exhibit B-5, Revised Application, p. 13.

67 Exhibit B-8-1, BCOAPO IR1 13.1.

68 Exhibit B-5, Revised Application, pp. 13-14.

69 Exhibit B-7, BCUC IR1 9.4.1 and 9.8.

70 Exhibit B-5, Revised Application, p. 13.

71 Exhibit B-5, Revised Application, p. 15; Exhibit B-7, BCUC IR1 10.1.

72 Exhibit B-5, Revised Application, pp. 15-16.

2028; however, the change was not material enough to impact the proposed rate.[73] FBC included sustaining capital in years 2028 through 2030 to reflect the cost to prolong the lives of the stations constructed in 2018, 2019 and 2020.[74]

(b) **Depreciation Rate**: FBC's estimated ten year service life for both the 50 kW and 100 kW DCFC stations is based on guidance provided by its vendor AddEnergie. A 10-year depreciation rate has been adopted or used by others in the industry, including the Vancouver EV Ecosystem Strategy, Southwestern Public Service Company, the Oregon Public Utilities Commission and Portland General Electric, and the Government of New Zealand.[75] FBC is requesting approval of the 10-year depreciation rate.

(c) **Cost of Electricity**: The cost of power from the DCFC stations is included at FBC's commercial rates under RS 21. FBC has assumed a typical half hour charge session will deliver 20 kWh of energy, with thirty-four individual 50 kW stations contributing 54 kW of demand and six 100 kW station contributing 108 kW of demand to each individually metered DCFC site.[76] FBC updated its cost of service to reflect the 4.36 percent increase to RS 21 approved by Order G-298-20.[77]

(d) **Operating and Maintenance**: FBC has included forecast operating and maintenance costs of $5,193 per year, for maintenance, travel, repairs outside of warranty, and FBC network management expenses, including half of a full-time equivalent (FTE) employee.[78] FBC expects costs to drop to $4,900 in 2026, due to a decreased need to monitor and manage third party location services, as FBC's DCFC sites will be well-established and require fewer interactions.[79]

The amount included for FBC's Network Management Services covers all the costs of administering the program, consisting of the labour required to maintain messaging displayed on the signage and at the stations, coordination of repairs and maintenance outages, monitor usage patterns to determine where new sites or stations may be required, management of station status notifications, pricing and customer messaging on third-party maps of EV charging sites (e.g., PlugShare) and oversight of reporting requirements (e.g. carbon credits from

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[73] Exhibit B-10, CEC IR1 17.1.

[74] Exhibit B-10, CEC IR1 17.1.

[75] Exhibit B-7, BCUC IR1 11.1.

[76] Exhibit B-5, Revised Application, p. 16. Also see Exhibit B-8-1, BCOAPO IR1 19.1.

[77] Exhibit B-16, BCUC IR2 20.4.

[78] The 0.5 FTE will perform administrative and general activities such as assisting accounting and regulatory with any reporting requirements for EV stations as well as the administrative tasks associated with validating and selling FBC carbon credits. (Exhibit B-17, BCOAPO IR2 38.1.1.)

[79] Exhibit B-8-1, BCOAPO IR1 15.2.

DCFC kWh volumes). FBC network management expenses also include payments to FLO related to modem rental cellular data backhaul for the DCFC stations.[80]

An additional allocation for administrative and general costs would double count costs already included in the cost of service, including: the cost of electricity under RS 21, which includes an allocation of administrative and general costs; the management services provided by FLO covered by the 15 percent transaction fee; and FBC's costs for network management service, maintenance, travel and repairs.[81]

(e) **Property Taxes:** FBC EV charging revenues will be subject to the 1% in lieu property taxes.[82] There is no property tax on the land itself since FBC has entered into 10-year no-cost Licenses of Occupation for the individual sites with a 5-year renewal option.[83]

(f) **Other Revenue – Carbon Credits: As discussed above,** FBC has included the monetization of carbon credits in the cost of service model so that the value of these credits is embedded in the EV charging rate.[84]

(g) **Income Taxes:** FBC has included income tax at the 2020 enacted rate of 27%, capital cost allowance ("CCA") of 30% on a declining balance basis, and additional CCA allowance per the Accelerated Investment Incentive regime. The result is an income tax recovery in the first few years.[85]

(h) **Earned Return:** FBC included an earned return based on FBC's approved equity thickness and return on equity of 40 percent and 9.15 percent, respectively. FBC also used its long term and short-term debt ratios and rates, which are embedded in FBC's 2020 and 2021 Annual Review, which was approved by Order G-42-21.[86]

84. Detailed calculations are provided in Attachments 20.6A and 20.6B to Exhibit B-16, which demonstrate that the charging rate collects the incremental cost of service over the analysis period based on FBC's assumptions.

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[80] Exhibit B-7, BCUC IR1 10.1.

[81] Exhibit B-8-1, BCOAPO IR1 15.2; Exhibit B-17, BCOAPO IR2 38.2 and 38.3.

[82] Exhibit B-5, Revised Application, p. 17.

[83] Exhibit B-9, BCSEA IR1 8.1.

[84] Exhibit B-5, Revised Application, p. 17.

[85] Exhibit B-5, Revised Application, p. 17.

[86] Exhibit B-5, Revised Application, p. 17 and Exhibit B-7, BCUC IR1 13.1.

C. Proposed Rates are Comparable to Market Rates

85. FBC's proposed rates are generally consistent with rates in place across Canada, as shown in Table 3-3 of the Revised Application, as reproduced below. The rates charged by non-regulated entities, such as Canadian Tire/Electrify Canada and Petro-Canada, can be assumed to be market-based or competitive rates.[87] Notably, the Petro-Canada stations shown in Table 3-3 are of higher output and have rates set at a level equivalent to FBC's proposed 50 kW rate.[88] Thus, market-based service providers are likely to be able to offer rates at or below FBC's proposed rates. If large price differences between FBC's rates and other rates arise, FBC may review the use of market-based versus cost of service-based rates for its DCFC stations.[89]

Table 3-3: EV Rate Comparison

Location	Provider	Fee Structure	Rate	Approx. # of fast chargers installed	Speed of fast chargers installed	Hyperlink
Alberta	ATCO	Time-based	$0.333/min	18	50 kW	https://www.atco.com/en-ca/projects/peaks-to-prairies-electric-vehicle-charging-station.html
British Columbia	City of Vancouver	Time-based	$0.26/min	7	50 kW	https://vancouver.ca/streets-transportation/electric-vehicles.aspx
British Columbia	FortisBC	Time-based (proposed rates)	50 kW [$0.26/min][90] 100 kW $0.54/min	23	50 kW – 100 kW	https://www.fortisbc.com/services/sustainable-energy-options/electric-vehicle-charging/public-electric-vehicle-charging-stations-in-bc
New Brunswick	NB Power / e-charge network	Time-based	$0.25/min	25	50 kW	https://www.echargenetwork.com/stations-and-rates
Ontario	Electric Circuit (Hydro Quebec)	Time-based	$0.283/min	75	50 kW	https://lecircuitelectrique.com/en/stations/fast-charge-station/
Quebec	Electric Circuit (Hydro Quebec)	Time-based	$0.1963/min	225	50 kW	https://lecircuitelectrique.com/en/stations/fast-charge-station/

[87] Exhibit B-10, CEC IR1 14.1.

[88] Exhibit B-10, CEC IR1 14.2.

[89] Exhibit B-7, BCUC IR1 6.2.

[90] Rates are as amended in Exhibit B-16, BCUC IR2 20.6.

Location	Provider	Fee Structure	Rate	Approx. # of fast chargers installed	Speed of fast chargers installed	Hyperlink
Various	Canadian Tire / Electrify Canada	Time-based, tiered by power level	< 75 kW: $0.27/min < 125 kW: $0.77/min < 350 kW = $1.07/min Idling fee = $0.40/min	24	50 kW; 150 kW; 350 kW	https://www.electrify-canada.ca/pricing/
Various	Petro-Canada	Time-based	AB: $0.33/min BC: $0.27/min MB: $0.33/min NB: $0.25/min NS: $0.25/min ON: $0.33/min QC: $0.20/min SK: $0.33/min	~100	100 – 350 kW	https://www.petro-canada.ca/en/personal/fuel/canadas-electric-highway

D. Exemption from General Rate Changes Is Just and Reasonable

86. It is just and reasonable to exempt RS 96 from general rate changes, as the proposed RS 96 is designed to recover FBC's cost of service over the next 10 years and the stable nature of the rate will help overcome barriers to the adoption of EVs and encourage the use of FBC's EV charging stations.

87. First, FBC has already included in its calculation of RS 96 reasonable estimates of the annual general rate change to RS 21, which represents the cost of electricity, and inflation factors for O&M and property taxes.[91] Therefore, FBC's proposed R2 96 will reasonably recover FBC's cost of service over a 10-year period and general rate changes on top of the embedded inflationary estimates are not required.

88. Second, the alternative of designing the rate without any inflation factors and instead escalating it by FBC's general rate change would not result in a more accurate recovery of FBC's

[91] Exhibit B-7, BCUC IR1 6.3.

costs of service.[92] FBC's general rate increase is based on FBC's overall revenue requirement, not just for the EV charging stations. Therefore, there is no direct or one-to-one connection between the cost of service of EV stations and FBC's general rate increase.[93]

89. Third, a stable rate that does not change annually will encourage EV drivers to use eligible charging stations, which will help maximize revenues over the life of the assets. A stable rate is expected to help overcome barriers to the adoption of EVs, by providing assurance of costs for EV drivers and avoiding discouraging use if rates were to escalate over time.[94]

E. RS 96 Performance Subject to Periodic Review

90. FBC is proposing that the performance of RS 96 would be subject to periodic review, as follows:

(a) FBC would periodically review RS 96 as part of its Cost of Service Analysis (COSA). Consistent with past practice, FBC initiates a COSA every 5 to 7 years.[95]

(b) FBC would review the DCFC Program performance as part of its Annual Review under the MRP. FBC's Annual Review will include updated annual forecasts for the EV Program.[96]

91. These reviews should provide confidence to the BCUC that RS 96 will remain sufficiently inline with FBC's costs such that RS 96 will reasonably recover FBC's cost of service for its eligible charging stations, as expected.

92. Furthermore, FBC would consider initiating a review of RS 96 if there were any material deviations from forecast revenues from existing stations or the cost of new stations as compared to existing stations, or if a new rate structure is identified that is feasible and

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92 Exhibit B-7, BCUC IR1 6.3.

93 Exhibit B-17, BCOAPO IR2 28.2.1.

94 Exhibit B-5, Revised Application, p. 12; Exhibit B-7, BCUC IR1 6.6; Exhibit B-17, BCOAPO IR2 28.1; Exhibit B-20, Flintoff IR2 1.1.

95 Exhibit B-7, BCUC IR1 6.7.

96 Exhibit B-7, BCUC IR1 6.8.1.

preferable to the current RS 96. FBC would file an application to the BCUC for approval of any change in RS 96 that was warranted as a result of such a review.[97]

F. Levelized Rates Consistent with Section 18(2) of the CEA

93. While Section 18(2) of the CEA specifies that the BCUC must set rates that allow the public utility to recover its costs incurred with respect to prescribed undertakings, it does not mandate from whom the revenue is collected. As described in the Revised Application, in years where FBC under recovers the costs from EV charging customers, the balance of the costs will be covered by FBC's other customers and, conversely, in years where EV charging revenues exceed costs, these benefits flow back to all of FBC's other customers. Over the life of the assets, the levelized rates as proposed in the Revised Application will balance costs and revenues.[98] FBC's rates will therefore satisfy section 18(2) of the CEA.

G. Proposed Rates Are Supported by Rate Design Principles

94. FBC's proposed EV rates are supported by rate design principles. FBC provided the following analysis:[99]

> **Principle 1:** Recovering the Cost of Service; the aggregate of all customer rates and revenues must be sufficient to recover the utility's total cost of service.
>
> - FBC has set its EV rates based on recovering the total cost of service.
>
> **Principle 2:** Fair apportionment of costs among customers (appropriate cost recovery should be reflected in rates).
>
> - The proposed EV rates recover the total cost of the EV service.
> - Higher rates for higher power stations are supported by a higher cost of service for those stations.
>
> **Principle 3:** Price signals that encourage efficient use and discourage inefficient use.

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[97] Exhibit B-7, BCUC IR1 6.9

[98] Exhibit B-7, BCUC IR1 6.6; Exhibit B-16, BCUC IR2 19.1.

[99] Exhibit B-7, Exhibit IR1 7.1.3.

- Time-based rates encourage efficient use when the charging rate slows down, such as when the state-of-charge increases above 80 percent. Unlike an energy-only rate, a time-based rate provides an incentive for drivers to unplug when the charging rates slows and before the EV reaches 100 percent if they do not require the additional energy.

- By setting the EV rates on a per minute basis and by setting the 50 kW and 100 kW stations on separate rates, FBC has structured the EV rates in a way that discourages inefficient use.

Principle 4: Customer understanding and acceptance.

- FBC has achieved this by setting all comparable EV stations to one easy to understand levelized rate, regardless of site location. In addition, the structure of the rates is similar to other rates in the EV charging services market, making them easy to understand and accept.

Principle 5: Practical and cost-effective to implement (sustainable and meet long-term objectives).

- A levelized rate is practical and cost-effective in that it is easy to understand and FBC does not need to incur any additional costs associated with tracking and regularly updating the rates.

Principle 6: Rate stability (customer rate impact should be managed).

- Since the EV rates are levelized and exempt from general rate increases, the rates are stable and EV customers won't have to worry about future price fluctuations.

Principle 7: Revenue stability.

- The levelized EV rate will also help with revenue stability and predictability year over year for FBC as demand will not be negatively impacted by increasing rates that may discourage consumer use of the DCFC stations. The static nature of the EV rate will help stabilize demand and provide improved revenue stability and predictability year over year.

Principle 8: Avoidance of undue discrimination (interclass equity must be enhanced and maintained).

- The proposed EV rate is designed to recover the total cost of service from EV drivers such that interclass equity is maintained.

H. Idling Fee Not Necessary At this Time

95. FBC's analysis of station usage patterns indicates that an idling fee is not necessary. An idling fee is an additional time-based charge that is added to the cost of a charging session after charging is complete, which is designed to discourage EV owners from occupying a charging station unnecessarily.[100] Based on charging behavior observed to date for FBC stations, drivers tend to charge at stations for around 30 minutes and then leave after charging their vehicles. As FBC has not experienced idling issues to date, an idling fee is not currently required.[101]

I. FBC Will Address Accessibility Concerns

96. In response to concerns raised by BCSEA-VEVA regarding accessibility at its stations, FBC commits to address accessibility at its DCFC stations through the following five steps:[102]

1. FBC will consult with Mr. Courteau and a variety of other persons with disabilities regarding accessibility at DCFC stations. FBC recognizes that not all disabilities are the same and that a variety of perspectives would be valuable to understand accessibility concerns.

2. In consultation with Mr. Courteau and other persons with disabilities, FBC will formalize accessibility guidelines for its DCFC stations. FBC will seek to align its guidelines with BC Hydro's EV Fast Charging: Design & Operational Guidelines For Public DCFC Stations In British Columbia (BC Hydro's Guidelines). FBC is aware that Mr. Courteau provided input to BC Hydro and that this input is reflected in BC Hydro's Guidelines. FBC is in general agreement with the accessibility requirements reflected in BC Hydro's Guidelines, which FBC understands Mr. Courteau is reasonably satisfied with.

3. FBC will take all reasonable steps to address any deficiencies in accessibility at its DCFC stations. Such steps could include, for example, installing curb ramps and associated level landing areas for operating DCFCs, ensuring parking stalls and landings are paved, and installing sufficient area lighting at charging sites.

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[100] Exhibit B-10, CEC IR1 13.3.

[101] Exhibit B-7, BCUC IR1 6.5 and 7.3.

[102] Exhibit B-13.

4. FBC will report to the BCUC on accessibility at its DCFC stations in its annual reviews. This reporting will include a summary of consultation, a review of FBC's accessibility guidelines, and a description of any improvements to accessibility that have been made, or are planned to be made, at its stations. FBC expects to substantially complete its work on accessibility by the time of the 2021 annual review process, but would continue to report annually until the consultation, guidelines and improvements are completed.

5. While FBC believes that any additional accessibility improvement costs will be minimal, any such costs can be examined during the annual review. If the costs are material enough to impact RS 96, FBC would propose amendments to RS 96 in the annual review process.

Part Four: Conclusion

97. This proceeding has resulted in a thorough examination of the issues related to FBC's DCFC EV stations that are prescribed undertakings. FBC submits that its evidence and submissions in this proceeding demonstrate that its approvals sought are just and reasonable and in the public interest. FBC therefore requests that the BCUC grant FBC's approvals sought as summarized in the introduction to this submission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: March 16, 2021 ***[original signed by Chris Bystrom]***

Christopher R. Bystrom

Counsel for FortisBC Inc.

BRITISH COLUMBIA UTILITIES COMMISSION

FORTISBC INC.

RATE DESIGN AND RATES FOR ELECTRIC VEHICLE DIRECT CURRENT FAST CHARGING SERVICE APPLICATION

PROJECT NO. 1598940

BOOK OF AUTHORITIES

Final Argument

of

FortisBC Inc.

INDEX

TAB 1

Court of Appeal for British Columbia

Citation: ***British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)***, 2003 BCCA 436

Date: 20030729
Docket: CA027158

Between:

British Columbia Hydro and Power Authority

Appellant
(Petitioner)

And

Environmental Appeal Board, the Attorney General of British Columbia, North Fraser Harbour Commission, Canadian Pacific Railway, General Chemical Canada Ltd., and Deputy Director of Waste Management

Respondents
(Respondents)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury

J.R. Singleton, Q.C. and D.G. Perry	Counsel for the Appellant
E.J. Rowbotham and N.E. Brown	Counsel for the Respondent, Attorney General of B.C.
K.E.W. Mitchell	Counsel for the Respondent, North Fraser Harbour Commission
P.A. Spencer	Counsel for the Respondent, Canadian Pacific Railway
D.K. Jones	Counsel for the Respondent, General Chemical Canada Ltd.

Place and Dates of Hearing:	Vancouver, British Columbia December 5 and 6, 2002
Place and Date of Judgment:	Vancouver, British Columbia July 29, 2003

Written Reasons by:
The Honourable Madam Justice Newbury

Concurring Reasons by:
The Honourable Madam Justice Prowse (P. 90, para. 79)

Dissenting Reasons by:
The Honourable Madam Justice Rowles (P. 93, para. 84)

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] On April 1, 1997, Part 4 of the ***Waste Management Act***, R.S.B.C. 1996, c. 482, was proclaimed in force, almost four years after it had been enacted by the Legislature. In general terms, Part 4 was obviously intended to strengthen and extend already existing provisions in the ***Act*** aimed at implementing the principle of 'polluter-pay' — the notion that a person who has contaminated or contributed to the contamination of real property should bear the costs of remedying such contamination.

[2] Part 4 requires that anyone seeking the subdivision or rezoning of land that is or was used for industrial or commercial activity, prepare and file a "site profile" with the authority specified in the ***Act***. The profile may lead to the ordering of a site investigation the purpose of which is to determine whether the site is contaminated. Division 3 of Part 4, headed "Liability" and attached as Appendix A to these Reasons, provides for the "remediation" of a contaminated site by the "responsible persons". This is a key phrase defined in s. 26.5 of the ***Act***. It includes both current and previous "owners" and "operators" of the site, as well as present and past transporters of contaminating substances, and even

certain secured creditors. Responsible persons are subject to two main consequences under Part 4: first, under s. 27.1, a manager appointed under the ***Act*** may issue a remediation order to any responsible person, requiring that he or she undertake the remediation of contaminated property or contribute "in cash or kind" to a person who has incurred remediation costs. Second, s. 27 provides that a person who is responsible for remediation is "absolutely, retroactively, jointly and severally liable" to any person or governmental body for reasonably incurred remediation costs.

[3] The central question posed by this appeal is whether B.C. Hydro and Power Authority ("B.C. Hydro") may be made the subject of a remediation order under s. 27.1 not by reason of its own acts or conduct, but by reason of the acts of B.C. Electric Corporation ("B.C. Electric") in and about a site in Vancouver between 1920 and 1957. B.C. Electric is no longer in existence: it amalgamated with two other corporations in 1965 to form B.C. Hydro, following which it was "declared to be dissolved" by special statute. Can B.C. Hydro be fixed now with the 'responsibility' under the ***Waste Management Act*** that B.C. Electric would attract if it still existed?

[4] The answer to this question involves two avenues of inquiry. First, it is argued that by virtue of the amalgamation, B.C. Electric continues to exist in some sense in the amalgamated corporation such that B.C. Hydro is subject to all the obligations of B.C. Electric, including even those arising under legislation enacted in 1997. B.C. Hydro argues, on the other hand, that given the unusual circumstances and terms of its amalgamation, it is subject only to those obligations of B.C. Electric that existed "immediately before the amalgamation" – words that appear in both the amalgamation agreement and an Order–in-Council approving it. If B.C. Hydro's argument is correct, then the second question is whether all or part of the ***Waste Management Act*** operates retroactively such that B.C. Electric may now be said to have been a responsible person with remediation obligations as of the time immediately before its amalgamation.

[5] This court is the third level of review of a decision of a manager under the ***Waste Management Act*** to the effect that B.C. Hydro could not be named as a "responsible person" by reason of the activities of B.C. Electric involving the site in question. At the first level of review, the Environmental Appeal Board held that the manager had erred and that B.C. Hydro could, by virtue of B.C. Electric's earlier conduct, be

named in a remediation order under s. 27.1. This determination was upheld on appeal to the British Columbia Supreme Court, from which decision the present appeal is taken.

[6] As will be seen below, I am of the view that the court below and the Board erred in concluding that the amalgamation agreement between the predecessor corporations of B.C. Hydro did not have the effect of limiting the liabilities and obligations assumed by the amalgamated corporation to those existing immediately prior to the amalgamation. Although the issue was not addressed by counsel, I conclude in the alternative that as a result of its amalgamation and dissolution in 1965, B.C. Electric cannot now be said to be a "person" and therefore cannot be said to be a previous or current "operator" or "owner" as those terms are defined in the ***Act***. Further, like the manager under the ***Act***, I conclude that Part 4 does not operate retroactively to attach remediation obligations to B.C. Electric as of the time immediately before its amalgamation on August 20, 1965. Accordingly, I would allow the appeal.

THE SITE

[7] In the early years of the 20th century, the property now known as 9250 Oak Street in Vancouver was the site of a plant

that manufactured roofing materials. Who exactly owned and operated the manufacturing facility at what times is not clear from the materials before us; but it would appear that one or more predecessors of the respondent General Chemical Canada Ltd. ("GCC") did so, and that beginning in or about 1920, one of those predecessors, referred to as "Barrett", entered into an agreement with B.C. Electric (until 1946, known as B.C. Electric Power and Gas Company) under which the latter supplied coal tar to the site from its gas plant in Vancouver. (In addition, B.C. Electric Railway Company, whose operations were eventually merged into those of B.C. Electric, operated a railway spur constructed in 1919 under an agreement with CPR which was used for transporting coal tar to and from the Oak Street site, but this fact was not developed by counsel). It appears the arrangements between Barrett and B.C. Electric continued until approximately August 1957, when GCC began to use oil-based asphalt rather than coal tar in its manufacturing process.

[8] In October 1966, the Oak Street property was acquired by Canadian Gypsum Company (now called "CGC Inc."), which operated the business until it sold to Globe West Products Inc. ("Globe West") in 1980. The respondent Mr. Lawson, a resident of Ontario, has been identified as a former director

and officer of the 'Globe West' companies. Globe West's parent, Globe Asphalt Products Ltd., underwent some corporate reincarnations but its ultimate parent company, GN Industries Inc., ceased carrying on business in 1991 and was wound up. In 1986, Globe West ceased manufacturing asphalt-based products on the site and sold the property to the North Fraser Harbour Commission. The Commission now uses the site for storage and vehicle parking.

[9] On May 20, 1998, the Deputy Director of Waste Management, acting as a "manager" under the ***Waste Management Act***, found that the site had been polluted by "serious, extensive and highly coal tar-related contamination" and that the property and others it had in turn contaminated, including the Fraser River, were "among the most severely contaminated sites in British Columbia." The manager found that GCC, CGC, GN Industries Ltd., North Fraser Harbour Commission, Her Majesty the Queen in Right of the Province as represented by B.C. Lands, and Mr. Lawson were "responsible persons" as defined in the ***Act***. The named parties took various appeals to the order, and GCC and CGC applied to have B.C. Hydro also named as a responsible party in the order.

B.C. ELECTRIC AND B.C. HYDRO

[10] The famous (or perhaps infamous) history of the provincial government's attempt in 1961 to obtain control of the generation and sale of electricity in British Columbia is perhaps not well-known to many born since then, but at the time it created a huge political controversy, as well as one of the longest trials in the (then) history of the Supreme Court of British Columbia. The legislature of the day passed three statutes in 1961 — the ***Power Development Act, 1961***, (2nd Session), c. 4, the ***Power Development Act, 1961 Amendment Act, 1962***, c. 50, and the ***British Columbia Hydro Power and Authority Act***, ***1962***, c. 8 — which purported to expropriate all the shares of B.C. Electric (then a wholly-owned subsidiary of British Columbia Power Corporation Ltd.) and to amalgamate it with British Columbia Power Commission into a corporation to be known as B.C. Hydro and Power Authority. The legislation purported to cancel all the obligations of B.C. Electric under any agreement, deed or trust or otherwise to allot or issue shares in its capital stock, thus impinging upon the terms of a private trust agreement between B.C. Power and B.C. Electric providing for the conversion of debentures of B.C. Electric into shares of B.C. Power Corporation. The legislation also purported to limit the access of the latter company to the

courts to dispute the compulsory acquisition of the B.C. Electric shares.

[11] On July 29, 1963 Lett, C.J.S.C. declared the three statutes *ultra vires* the province as effectively purporting to sterilize the functions and activities of B.C. Power Corporation, a Dominion corporation, by a law not of general application. (See ***British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia*** (1963) 47 D.L.R. (2d) 633.) In the words of the Chief Justice:

> In the light of this evidence and on these authorities, I can come to no other conclusion than that the effect of the impugned legislation would be to make it impossible "in a practical business sense" or "in a practical way" for the plaintiff company to exercise its powers and therefore, to use the words of Lord Atkin in *Lymburn v. Mayland*, [1932] 2 D.L.R. 6 at p. 10 ..., "... the functions and activities of [the] company were sterilised or its status and essential capacities impaired in a substantial degree." [at 703]

[12] Although the Court's conclusion stated above now appears to be of doubtful validity (see ***Churchills Falls (Nfld.) Corp. v. Attorney General of Newfoundland*** (1984) 8 D.L.R. (4th) 1 (S.C.C.), at 26), it obliged the government of the day to take a more conciliatory view to B.C. Power Corporation and its shareholders. Eventually, the dispute, and an appeal taken from the trial judgment, were resolved by agreement.

[13] Following the settlement, the Province in March, 1964 enacted another ***British Columbia Hydro and Power Authority Act***, ***1964,*** this one cited as S.B.C. 1964, c. 7, and the ***Power Measures Act, 1964***, S.B.C. 1964, c. 40. The former statute successfully created British Columbia Hydro and Power Authority (the "Authority") as an agent of Her Majesty in Right of the Province. The Authority was given various powers relating to the generation, manufacture, distribution and supply of power. It was authorized to "amalgamate in any manner with or enter into partnership with any corporation, firm or person." (My emphasis.) Consistent with its status as an agent of the Crown, it was also given powers of expropriation, and immunity from certain actions and proceedings described at s. 52(3) of the ***British Columbia Hydro and Power Authority Act, 1964***. Section 53(1) stated that the Authority was not bound by any statute of the Province, except as provided by the 1964 Act.

[14] By the ***Power Measures Act, 1964***, the Province "validated and confirmed" everything "done as directors of the Company [B.C. Electric] by the persons who [had] been named as directors of the Company" in the invalid legislation of 1962. This statute also validated and confirmed the creation and exchange by B.C. Electric of certain bonds and the

cancellation of preferred shares in B.C. Electric, the redemption of certain debentures, and the termination and cancellation of "any obligation of [B.C. Electric] incurred or that may or shall arise under any agreement, deed of trust or otherwise to allot or issue shares in the capital stock of the Company". (s. 6(2).) Section 9(1)(a) empowered B.C. Electric or B.C. Power Commission or both to "amalgamate or enter into partnership with each other or with each other and any other corporation or corporations".

[15] It was not long before the powers of amalgamation given to the three entities were exercised. On August 29, 1965, the Authority, B.C. Power Commission and B.C. Electric entered into an Amalgamation Agreement. (See Appendix B to these Reasons.) The Agreement stated that the three corporations amalgamated in such a manner that:

> (*a*) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964,
>
> (*b*) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
>
> (*c*) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise,

> and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation. [Emphasis added.]

The amalgamation became effective as of 5:00 p.m. Vancouver time on August 20, 1965.

[16] When the ***Power Measures Act, 1966***, S.B.C. 1966, c. 38, was enacted in 1966, the signed Amalgamation Agreement was appended as a schedule. This statute ratified and confirmed the Agreement as having been validly made and as being in full force and effect since August 20, 1965. Section 4 stated that the amalgamation would not constitute a breach of any covenant or an event of default under any trust deed or other document under which bonds, debentures or other securities of the predecessor companies had been issued. Under s.5, all the common shares in the capital of B.C. Electric owned by the Province "immediately before the amalgamation" were deemed to have been surrendered to B.C. Hydro and Power Authority "and cancelled immediately upon the amalgamation having become effective." Section 6(1) stated that all assets, undertakings powers and rights purported to have been made, and all debts, liabilities and obligations purported to have been incurred "in the name of British Columbia Hydro and Power Authority but

not made, acquired or incurred by or issued by the Authority" were deemed to have been made, acquired, issued, incurred by, to, for or on behalf of B.C. Power Commission or B.C. Electric or both, as the case required; and that the amalgamated corporation (which I refer to as "B.C. Hydro") was possessed of all such "properties, assets, undertakings ... and franchises to the extent that they have not been disposed, and ... subject to the *Power Measures Act, 1964*, subject to all such debts, liabilities, and obligations to the extent that they have not been discharged."

[17] Also on August 20, 1965, Order-in-Council No. 2386 was passed approving the amalgamation of the three corporations, again in such a manner that:

> (a) they continue as one amalgamated corporation which is British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964, and
>
> (b) the said British Columbia Electric Company Limited and the said British Columbia Power Commission cease to exist as separate corporations, and
>
> (c) the said British Columbia Hydro and Power Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise and subject to the Power Measures Act, 1964 be liable for all duties, liabilities and obligations, whether conferred or

> imposed by statute or otherwise, of each of the said British Columbia Hydro and Power Authority, British Columbia Electric Company Limited and British Columbia Power Commission immediately before the amalgamation: [Emphasis added.]

A copy of the Order is appended to these Reasons as Appendix C.

[18] Last, another Order-in-Council, No. 2387, was passed on August 23, 1965. (See Appendix D hereto). The operative paragraph of that Order "recommended" that:

> . . . pursuant to the *Power Measures Act, 1964*, and all other powers thereunto enabling section 212 of the *Companies Act* shall apply to the British Columbia Electric Company Limited, and that pursuant to that section the incorporation of British Columbia Electric Company Limited be revoked and cancelled and that British Columbia Electric Company Limited be declared to be dissolved, and that such other provisions of the *Companies Act* apply to the British Columbia Electric Company Limited to the extent necessary to effect the revocation, cancellation and dissolution hereby made. [Emphasis added.]

Thus ended the long and contentious process by which the generation of hydro-electric power throughout most of the Province became the function of a public utility which since 1965 has played such an important role in British Columbia's industrial and economic life.

THE WASTE MANAGEMENT ACT

[19] Before reviewing the operation of Part 4 of the ***Waste Management Act*** in detail, I will note briefly its predecessor, the ***Pollution Control Act, 1967*** (S.B.C. 1967, c. 34). Section 26 thereof contained what by comparison to the present legislation is a narrow version of the polluter-pay principle. It provided in material part:

> 26. (1) Where, in the opinion of the Minister
>
> (a) pollution has been, is being, or is likely to be caused, suffered or permitted within the territorial jurisdiction of the Province, on land, on or in water, or in air,
>
> (b) the pollution is not being or is unlikely to be prevented, controlled, removed, or abated by a person causing, suffering, or permitting it, or by the local authority for the areas suffering the pollution, or by any other agency, and
>
> (c) immediate action is required to prevent, control, remove, or abate the pollution, he may, by order approved by the Lieutenant-Governor in Council, declare a pollution emergency exists in a part or the whole of the Province.
>
> (2) Where the Minister makes an order under subsection (1), he, or a person authorized in writing by him, may require any person to provide labour, services, material or equipment for the purpose of preventing, controlling, removing or abating the pollution . . .

> (4) A certificate signed by the Minister showing the total costs and expenses incurred by the Government and the amount of money paid out by the Government under this section may be filed in the Supreme Court and, on being filed, shall, for all purposes except an appeal, be deemed to be a judgment of the court and enforceable as such against the person named in it as the person causing or permitting the pollution and liable for the costs and expenses incurred and money paid. [Emphasis added.]

[20] In ***Re Rempel-Trail Transportation Ltd. and Neilsen*** (1978) 93 D.L.R. (3d) 595 (B.C.S.C.), Taylor J. (later J.A.) considered s. 26 in connection with a highway accident that had occurred six months before s. 26 came into force. The accident resulted in the petitioner's truck dumping an oily substance into a lake. Three weeks after s. 26 came into force, the Minister issued an order under s. 26(1) alleging that the substance had been observed seeping from land adjacent to the highway and that the substance was "entering onto the waters of Red Rocky Lake and environs." The Minister incurred various costs in containing and cleaning up the pollution. Several months later, he issued a certificate under s. 26(4), naming the petitioner.

[21] One of the petitioner's arguments on judicial review was that the certificate was invalid because it related to an event that had occurred prior to the coming into effect of the

relevant provisions of the ***Pollution Control Act***. The Minister argued, on the other hand, that it was an "existing condition of pollution" which gave rise to liability on the petitioner's part for the clean-up costs, rather than the "act of polluting" itself. Taylor J. did not accede to this view. In his analysis:

> If the Minister's position is right, those whose conduct caused pollution, within the meaning of the Act many years, or even decades ago without in any way breaking the law, could now be charged with the costs of cleaning up that pollution; these costs could be very substantial indeed in the case of many manufacturing or mineral extraction operations according to the applicant.
>
> Authorities were cited on both sides in which statutes not expressly retroactive have been held to have, or not to have, retrospective effect. But I think the issue is determined by the clear words of the section. While s-s. (1) refers to a situation in which pollution "has been, is being, or is likely to be caused", this subsection does not authorize imposition of liability. The wording of s-s. (4), which authorizes the charging of clean-up costs to a party responsible for pollution, says that the Minister's certificate is to be enforceable against "the person causing or permitting the pollution". The tense is present. The subsection seems to refer to those who at the time of the declaration of the emergency were "causing or permitting" the pollution. [at 598-9; emphasis added.]

[22] Taylor J. added that had he not reached this conclusion on the words of the subsection itself, he would have arrived at the same result "on the basis of the authorities concerning

construction of statutory provisions not expressly made retroactive in circumstances in which new obligations, burdens, or disabilities may be imposed as a consequence of events pre-dating their enactment." (At 599.) He discussed the meaning of retroactivity and the presumption against it in statutory construction, to which reference will be made below. Turning then to the argument that the presumption does not apply to a statute intended "for the protection of the public", he said:

> While the principle intent of the statute undoubtedly is the protection of the public, it cannot be said that this is the purpose of s. 26(4); the purpose of the subsection is to recover from an individual money expended by the Minister under authority of the statute, a result which, like the raising of tax revenues, certainly benefits the public, but cannot be said to constitute a form of public protection. [at 601]

[23] It was against this background that the ***Waste Management Act***, R.S.B.C. 1979, c. 428.5, and later amendments became law. Section 22 of the early form of the ***Act*** provided:

> 22. (1) Where a manager is satisfied on reasonable grounds that a substance is causing pollution, he may order the person who had possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment, or any other person who caused or authorized the pollution to do any of the things referred to in subsection (2). [Emphasis added.]

Subsection (2) stated that such an order could require the person on whom it was served to undertake site investigations and ultimately to carry out measures reasonably necessary to abate or stop the pollution in question.

[24] Section 22 was considered by Lander J. in ***West Fraser Timber Co. v. British Columbia (Regional Waste Manager)*** [1988] B.C.J. No. 2127 (B.C.S.C.), where one of the defendants, Domtar, had operated a mill and wood treatment plant on land part of which it owned and part of which it leased from B.C. Rail. Domtar sold the former property and assigned the lease to West Fraser in 1978. On the expiration of the lease, the property sat vacant. In 1987, a manager under the ***Act*** issued an order naming four parties, including Domtar. Domtar contested the order, arguing that s. 22 was not retroactive or retrospective, and relied on ***Re Rempel-Trail Transportation***, *supra*. However, Lander J. took a somewhat different view of the new ***Act***. He reasoned as follows:

> Under the new legislation, and particularly having regard to s. 22:
>
> > (1) there is no express provisions [sic] of retroactivity;
> >
> > (2) the clear words of the section refer to "the person who had possession, charge or control of the substance at the time it escaped ... or was abandoned or introduced into the

> environment, or any other person who caused or authorized the pollution ...;
>
> (3) there is no new obligation imposed which was not created by the 1967 legislation, which was in force at the time of this incident;
>
> (4) the intent of the legislation, including the amendments which included the clarification of the word "person", is clearly to protect the public; and to place the responsibility for pollution abatement and cleanup on those private parties who caused the pollution or were in control of the problem material.
>
> (5) further, such amendments are in the nature of procedural clarification in view of the earlier legislation.
>
> Even if the presumption against retrospective operation applies, and it is not at all apparent that it does, the clear intent of the legislation is to allocate the cost of pollution on those people who caused it in the protection of the public interest. There was no error of law or jurisdiction in this regard in the order of October 20, 1987. [at 7-8; emphasis added.]

In the result, the Court held that the manager's order had been validly made under s. 22 of the ***Waste Management Act***.

[25] Section 22 of the early ***Act*** was also considered in ***British Columbia Railway Co. v. Driedger*** [1988] B.C.J. No. 3053 (aff'd at [1990] B.C.J. No. 1207 (B.C.C.A.)), where Gibbs J. (as he then was) held that the provision could not apply to "an innocent, ignorant (in the sense of not knowing) owner who had nothing to do with, and no knowledge of" the contamination

of the site in question, or the attempts of others to rectify the problem. Gibbs J. observed:

> The theme of the Act is that the person who has custody of polluting substances is responsible for safe custody, that the person who uses is responsible for safe use, that the person who transports is responsible for safe transportation, and that the person who fails to discharge his responsibility must accept liability for the remedial measures. It is the safe use responsibility which arises here, and although it may be possible to strain the words of Section 22(1) to fit B.C. Rail, I am satisfied that the legislature did not have that intent. I would have to see much stronger and more specific words. . . . [para. 10]

Part 4 of the Present Act

[26] As earlier mentioned, Part 4 of the ***Act***, headed "Contaminated Site Remediation", was proclaimed in force on April 1, 1997. Division 1 of Part 4 contains various definitions, including the following:

> "contaminated site" means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains
>
> (a) a special waste, or
>
> (b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions;
>
> "operator" means, subject to subsection (2), a person who is or was in control of or

> responsible for any operation located at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3);
>
> "owner" means a person who is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3);
>
> "person" includes a government body and any director, officer, employee or agent of a person or government body;
>
> "remediation order" means a remediation order under section 27.1;
>
> "responsible person" means a person described in section 26.5;

The term "remediate" is not defined; however, the ***Act*** defines "remediation" to mean action "to eliminate, limit, correct, counteract, mitigate or remove" any contaminant or the negative affects thereof on the environment.

[27] Division 2 and regulations thereto establish the conditions under which a property owner, a person applying for subdivision or zoning approval, a vendor of land or a trustee, receiver or liquidator or person commencing foreclosure proceedings in respect of land that has been used for industrial, commercial or other prescribed activities, is

required to prepare a site profile and provide it to a manager appointed under the ***Act***. The manager may then order a preliminary or detailed site investigation and, under s. 26.4(1), may determine whether a site is contaminated. Notice in writing of the manager's preliminary determination is given to various interested persons, who are given the opportunity to comment on the preliminary determination. The manager may then make a final determination, which decision may be appealed under Part 7 of the ***Act***.

[28] Division 3, the most important for purpose of this appeal, is headed "Liability". I have appended the whole of Division 3 as Appendix A to these Reasons, but will note here the provisions of particular relevance. It will be recalled that the term "responsible person" is defined to mean a person described in s. 26.5. Section 26.5(1) states:

> 26.5 (1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:
>
> (a) a current owner or operator of the site;
>
> (b) a previous owner or operator of the site;
>
> (c) a person who
>
> (i) produced a substance, and

> (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
>
> (d) a person who
>
> (i) transported or arranged for transport of a substance, and
>
> (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
>
> (e) a person who is in a class designated in the regulations as responsible for remediation. [Emphasis added.]

Subsection (2) contains similar provisions defining "responsible person" in connection with property contaminated by the migration of a substance from elsewhere to the contaminated site.

[29] Section 26.5(3) establishes the conditions under which a secured creditor is or is not responsible for remediation of a contaminated site, and s. 26.6(1) lists a series of persons who are not responsible for remediation, including those described in subpara. (d):

> (d) an owner or operator who establishes that
>
> (i) at the time the person became an owner or operator of the site,
>
> (A) the site was a contaminated site,
>
> (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
>
> (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
>
> (ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
>
> (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

Under s-s. (3), a person seeking to establish that he or she is not a "responsible person" has the burden of proving "all elements of the exemption on a balance of probabilities."

[30] The concept of "responsible person" or 'responsibility' under Part 4 is, as the Deputy Director of Waste Management suggested in his factum, a statutory term of art. As he submitted, s. 26.5 is not so much a definition section "as much as it is a detailed description (along with s. 26.6) of

the persons subject to two distinct consequences, which collectively comprise 'responsibility' in this novel statutory regime." He characterizes the two consequences as "regulatory" — as described in s. 27.1 — and "financial" — as described in s. 27(1).

[31] Under s. 27.1(1), a manager may issue a remediation order to any responsible person, requiring that that person undertake remediation, contribute "in cash or in kind" to another person who has reasonably incurred remediation costs, or give security on conditions specified by the manager. When considering "who will be ordered to undertake or contribute to" remediation, the manager must take certain factors into account, including the terms of any private agreements between responsible persons regarding liability for remediation. Also under s-s. (4), the manager must "name one or more persons whose activities, directly or indirectly, contributed most substantially" to the contamination of the site. The manager may obtain a (non-binding) opinion of an "allocation panel" as to whether a person is a responsible person or was a "minor contributor" to the contamination; or concerning the share of remediation costs that should be attributed to a particular responsible person. (I note parenthetically that no argument was advanced in this case as to whether s. 27.1 confers on the

manager the powers of a superior court judge contrary to s. 96 of the ***Constitution Act***. I shall assume the section is valid for purposes of this appeal.) Section 27.1(5) states that a remediation order does not affect the right of a person affected by the order to obtain relief under an agreement, other legislation or common law.

[32] Section 27, the "financial" provision, deals with the recovery by "any person or government body" of remediation costs. It states in part:

> 27 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site. . . .
>
> (3) Liability under this Part applies
>
> (a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and
>
> (b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

> (4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part. [Emphasis added.]

[33] It will be noted that s. 27(1) does not on its face require the issuance of a remediation order before it operates: all that the person or government body seeking recovery needs to show is that it has incurred, reasonably, remediation costs in respect of a contaminated site. Whether a person seeking recovery must nevertheless satisfy various regulatory conditions under Part 4 has been the subject of considerable litigation: see ***Swamy v. Tham Demolition Ltd.*** (2000) 81 B.C.L.R. (3d) 293 and [2001] B.C.J. No. 721, ***O'Connor v. Fleck*** (2000) 79 B.C.L.R. (3d) 280, and ***No. 158 Seabright Holdings Ltd. v. Imperial Oil Ltd.*** [2001] B.C.J. No. 1922, all decisions of the Supreme Court of British Columbia; and the recent decision of this court in ***Workshop Holdings Ltd. v. CAE Machinery Ltd.***, 2003 BCCA 56, [2003] B.C.J. No. 165. Noteworthy for purposes of this appeal, however, is that for the "absolute" liability to arise, it appears the remediation costs must have been incurred by the person or

government suing for recovery. That is not necessarily the case where an order is made under s. 27.1, which contemplates that the responsible person or persons named in the order may be required to carry out or contribute to remediation work yet to be done.

[34] Section 27.1 is the foundation for the proceeding in this case. An order was issued by a manager on May 20, 1998 identifying six entities as "persons responsible" for the remediation of the site at 9250 Oak Street in Vancouver and neighbouring land. Certain of the entities so named applied to the manager to add B.C. Hydro as a "responsible person" under the order. Thus the proceeding is not an action taken by one responsible person to recover remediation costs from another (allegedly) responsible person under s. 27(4); rather, the proceeding was initiated by the issuance of a remediation order by a manager under s. 27.1, and concerns an application to him by those originally named, to amend his order. In the Deputy Director's terminology, this proceeding is "regulatory" rather than "financial".

THE ISSUES AND THE DECISIONS BELOW

[35] As noted earlier, the central question posed on this appeal is whether B.C. Hydro is or may be a "responsible

person" under the ***Waste Management Act*** by reason of the activities of B.C. Electric in and around the Oak Street property between 1920 and 1957. Counsel for B.C. Hydro conceded, rightly in my view, that if B.C. Electric were still in existence, it would be a "responsible person" by reason of its activities at the site until 1957. To this extent the ***Waste Management Act,*** unlike its predecessor the ***Pollution Control Act***, operates in respect of events – polluting conduct – predating its enactment. But since B.C. Electric no longer exists, B.C. Hydro must be shown to have somehow 'assumed' or 'inherited' (I use those terms loosely) its obligations either expressly or by implication, in order to be fixed with 'responsibility' under the ***Act.*** The respondents say that it did – that both under the terms of the Amalgamation Agreement and by virtue of the essential nature of a corporate amalgamation, B.C. Hydro is fixed with the liabilities to which B.C. Electric would have been subject had it not amalgamated.

[36] In answer, B.C Hydro contends that the effect of an amalgamation depends on the meaning and intent of the statute under which it was carried out; and that in the unusual circumstances surrounding this amalgamation, B.C. Hydro became subject only to the liabilities and obligations of B.C.

Electric that existed "immediately before the amalgamation." As well, B.C. Hydro submits that although the word "retroactively" appears in s. 27(1) of the ***Waste Management Act***, there is nothing in s. 26.5(1) or elsewhere in Part 4 that operates retroactively to result in B.C. Electric's having been a "responsible person" with remediation obligations as of 4:59 p.m., August 20, 1965 — immediately before the amalgamation.

[37] The manager appointed under the ***Waste Management Act*** addressed both these issues in his reasons of October 15, 1998. He began by noting that had the 1965 amalgamation been an 'ordinary' one — one carried out pursuant to the British Columbia ***Companies Act***, for example — all obligations and liabilities of B.C. Electric would have "flowed on" into B.C. Hydro. However, he said:

> There is . . . one critical difference. The amalgamated BC Hydro was limited to the obligations of BC Electric that existed as of a particular moment in time - 5:00 p.m. on August 20, 1965. This amalgamation clearly gives BC Hydro greater protection from legal liability than would be the case in the usual corporate amalgamation. This limitation of liability, ratified by Order in Council and by legislation, is critical. The courts have made clear that the effect of any particular amalgamation depends ultimately on the terms of the applicable legislation: *R. v. Black & Decker*.

As well, he noted, if B.C. Hydro's actions or status had been at issue — either before or after 1965 — it could clearly be named as a responsible person under s. 26.5. But again, he said:

> . . . on the information before me, BC Hydro had nothing to do with 9250 Oak Street. BC Hydro only came into existence in 1964. At that time, it was separate and distinct from B.C. Electric. The Amalgamation Agreement is dated August 20, 1965.
>
> As for BC Electric, it is now dissolved and has no separate existence. Both today and on April 1, 1997, the date on which the 1993 amendments came into force, BC Electric did not exist as a separate entity. If BC Electric had retained separate status, or had amalgamated with B.C. Hydro in the ordinary fashion under British Columbia law, I would have no hesitation in considering its responsibility under s. 26.5 as part of the new amalgamated entity: *Witco Chemical Co. v. Oakville (Town*), [1975] 1 S.C.R. 273.
>
> One is therefore left with what the Amalgamation Agreement says about *BC Hydro's liability for the acts of BC Electric*. The law, as set out in the Amalgamation Agreement and as approved by Cabinet Order and subsequent legislation, tells me that in this particular amalgamation, B.C. Hydro can only be liable for the statutory obligations of BC Electric as they existed immediately before August 20, 1965. [Underlining represents my emphasis.]

[38] The manager found that the "responsible person" provisions of the ***Waste Management Act*** could apply to B.C. Electric only if those provisions were "fully retroactive" — i.e., "if the 1993 amendments which came into effect in 1997,

reached back in time and changed the law as it existed in 1965 by making B.C. Electric a responsible person at that time." He noted the distinction between "retroactive" and "retrospective" legislation described by Professor E.A. Driedger in 1978 in an article entitled "*Statutes: Retroactive Retrospective Reflections*", 56 ***Can. Bar Rev.*** 264, which distinction I will discuss more fully below. The manager concluded that s. 26.5 of the ***Waste Management Act*** was not retroactive. In his analysis:

> In my opinion, for the purpose of the power to issue a remediation order in s. 27.1(1) of the *Act*, the definitions of responsible person in the 1993 amendments to the *Waste Management Act* are not retroactive. Nothing in the language of s. 26.5 suggests that the definitions operate backward in time and change the law from what it was in 1965. The provisions are instead a clear example of retrospective legislation which – in relation to the definition of responsible person – operates for the future, but in so doing imposes new legal consequences in respect of past actions, events or status. Thus, on April 1, 1997, a person who was a past or present owner or operator of a contaminated site, or a person who in the past was a producer or transporter, became a responsible person subject to a remediation order. While the effect of the amendments was to *dramatically expand in the present the responsibility of persons for their past actions or status*, the amendments do not change the law as it existed before the legislation came into force. Because the 1993 amendments do not reach back in time and change the law so that, as of August 20, 1965, BC Electric was a responsible person, the only logical conclusion is that BC Hydro cannot be legally responsible for the actions of BC Electric.

In arriving at this conclusion, I have given careful consideration to the express use of the word "retroactive" in s. 27(1). However, this does not speak to the 1993 amendments generally, or to the power to issue a remediation order in particular. Instead, the word is used specifically in the liability provision:

> 27(1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively, jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

Section 27(1) does not, as I read it, make retroactive the entire set of 1993 amendments or the definitions of responsible persons so as to change past laws. Instead, what it plainly says is that where persons are responsible for remediation under these amendments, *their liability to others for the reasonably incurred costs of remediation by those others (including government) is retroactive (as well as absolute, joint and several).*

BC Hydro states that whether this use of the term "retroactive" might make BC Hydro liable in damages for BC Electric's actions in a s. 27 claim is not an issue I have to decide here. I agree. Whether ordered parties might rely on s. 27 to recover remediation costs against BC Hydro (either in its own right or as a result of the actions of any existing former officers or directors of BC Electric who might be indemnified by BC Hydro) is a question they can pursue as they see fit. However, I am satisfied that s. 27 does not take the 1993 amendments back in time and change the law as it existed on August 20, 1965 such that as of that date, BC Electric was a responsible person subject to a remediation order. [Underlining represents my emphasis.]

[39] Later in his reasons, the manager (whose name happens to be Mr. R.J. Driedger) acknowledged that he had come to this conclusion reluctantly, since B.C. Hydro had found "a 'legal gap' which has little moral or policy justification in so far as avoidance of contaminated sites legislation is concerned." He noted it was open to the Legislature to close this 'gap' and suggested that B.C. Hydro might co-operate in remediation efforts on a voluntary basis "either as part of good corporate citizenship or in the context of lawsuits filed by the parties."

The Environmental Appeal Board

[40] The Harbour Commission, GCC and CGC appealed to the Environmental Appeal Board on the basis that the manager had erred in law. The Board allowed the appeal for reasons dated August 23, 1999. It began its reasons by describing the arguments made by GCC and the Harbour Commission concerning the effect of a corporate amalgamation, as illuminated by the Supreme Court of Canada's decision in ***R. v. Black and Decker Manufacturing Co.*** [1975] 1 S.C.R. 411. In that case, the Court noted that the language used in the ***Canada Corporations Act,*** RSC 1970, c. C-32, to the effect that an amalgamated company "is subject to all the contracts, liabilities, debts

and obligations of each of the amalgamating companies", was "all-embracing" and "merely supportive of a general principle".

[41] The Board also noted that ***Black and Decker*** had been considered by the Supreme Court of British Columbia in ***Rossi v. McDonald's Restaurants of Canada Ltd.*** [1991] B.C.J. 429. There, the Court declined to follow earlier case law to the effect that on an amalgamation under the British Columbia ***Companies Act***, the amalgamating companies do not continue to exist. On a consideration of cases decided under federal, Ontario and British Columbia corporate legislation, the Court in ***Rossi*** held that a corporate amalgamation does not constitute an assignment (in ***Rossi,*** of a lease). In the words of Shaw J., ". . . there is not the complete divestiture of property or rights which is a fundamental characteristic of an assignment." (at 5)

[42] The Board in the instant case considered the argument of GCC and the Harbour Commission that the words "immediately before the amalgamation" (which did not appear in the B.C. ***Companies Act*** and do not now appear in the ***Canada Business Corporations Act***, R.S.C. 1985, c. C-44), were intended to have a similar effect to the word "thereafter" in the ***Companies Act***

"by establishing that from the moment of amalgamation, the new entity assumes the obligations of the amalgamating entities." Following a review of the steps by which B.C. Hydro had been created and amalgamated in 1964, the Board concluded that the Legislature had intended "to combine the three amalgamating entities in such a way that they continue to exist as one unified entity." In the Board's analysis:

> As a consequence of their amalgamated status, they no longer exist as **separate** entities. Specifically, B.C. Electric continues as an element of the amalgamated B.C. Hydro, though it is no longer a discrete entity. The analogy of three streams merging and mixing to form one river illustrates this concept. Therefore, based on the nature of the amalgamation process, the amalgamated B.C. Hydro cannot avoid liability for the past acts of a part of itself, i.e. B.C. Electric, unless there is a clear legislative intent to stop this liability from flowing to B.C. Hydro.

[43] The Board then considered the meaning of the words "immediately before the amalgamation" contained in the Amalgamation Agreement and Order-in-Council. As before, GCC and the Harbour Commission argued that the phrase merely denoted "the time from which the amalgamated B.C. Hydro takes on the liabilities of the amalgamating entities". Noting that the words of a statute are to be read in their entire context, the Board observed that:

> . . . the Agreement contains no phrases such as "is only liable for" or "is not liable thereafter for" which would clearly indicate an intention to limit liability. Rather, the Agreement contains broad and inclusive language, providing that the amalgamated B.C. Hydro "shall be liable for **all the duties, liabilities and obligations**" of each of the amalgamating companies, "whether conferred or imposed by statute or otherwise ... immediately before the amalgamation."

[44] After reviewing various corporations statutes and the 1964 statutes dealing with B.C. Hydro, as well as the objects and purposes of the ***Waste Management Act*** (to which B.C. Hydro is subject by virtue of s. 32(7)(y) of the present ***British Columbia Hydro and Power Authority Act***, R.S.B.C. 1996, c. 212), the Board concluded:

> . . . the purpose of the words "immediately before the amalgamation" in the Agreement is to recognize the date from which the amalgamated B.C. Hydro became liable for all of the liabilities, duties and obligations of the amalgamating entities, and became seized of and possessed all their assets, rights, undertakings, powers, privileges, etc. The Agreement contains no language showing an express or clear intention to limit the amalgamated B.C. Hydro's liability for the actions of the amalgamating entities, including B.C. Electric.
>
> Therefore, the Panel finds that B.C. Hydro can be liable for the pre-amalgamation actions of B.C. Electric, and may be named a responsible person under Part 4 of the *Waste Management Act* on that basis. The Panel orders that this matter be remitted to the Deputy Director for a determination, as to whether, on the facts, this is an appropriate case in which to find that B.C. Hydro should be

> named as a responsible person to the Order and subsequent amendments. [Emphasis added.]

[45] Given this finding, the tribunal agreed with GCC and the Harbour Commission that it was unnecessary to determine whether the ***Waste Management Act*** is "retroactive, such that B.C. Electric could have been a 'responsible person' at the time of amalgamation." The Board nevertheless expressed the view that although s. 27(1) (the "liability" provision) of the ***Waste Management Act*** was clearly retroactive, s. 26.5 operated only retrospectively "to define who may be a responsible person". In their words:

> The Panel agrees that an important purpose of Part 4 is to make polluters pay for cleaning up contamination that results from both their actions, regardless of whether those actions occur in the past or the present. This serves the public interest in preventing and reducing harm to the environment and human health, and correctly places the costs of clean up on those responsible, rather than on tax payers. With this purpose in mind, section 26.5 casts a broad net in defining "responsible person." However, the Panel finds that section 26.5 need not be applied retroactively in order for Part 4 to achieve its purpose. Rather, Part 4 imposes a duty, as of the law's coming into force, on responsible persons to pay "absolutely, retroactively and jointly and severally" for the cost of cleaning up contamination resulting from their past and present activities. By applying section 26.5 retrospectively and section 27(1) retroactively, the *Waste Management Act* makes responsible persons pay to the full extent possible, without having to make them responsible persons in the past.

However, the Board did not find it necessary to reach a conclusive finding on this issue.

Supreme Court of British Columbia

[46] In October, 1994, B.C. Hydro filed a petition in the Supreme Court of British Columbia pursuant to the ***Judicial Review Procedure Act***, seeking an order quashing the Board's decision or relief in the nature of *certiorari*. The Chambers judge dismissed the appeal from the bench on April 6, 2000. I quote below the material part of his reasoning:

> In my opinion, the clear purpose of [clause 1(c)] of the Amalgamation Agreement] is to prevent the expiration of B.C. Electric's legal responsibilities upon amalgamation. Its clear purpose is to transfer those responsibilities to the new single entity formed from three pre-amalgamation entities. B.C. Electric lives on in the petition as the result of a transition intended by the Legislature to be seamless. The acts giving rise to contamination had been completed prior to the amalgamation and any legal responsibility for those acts arising before or after the amalgamation was assumed by the petitioner. If the Legislature had intended to limit the transfer only to legal responsibility that arose or materialized before the amalgamation and not after, it would have and should have made that intention clear by explicit language to that effect. I agree with the conclusion of the Board that the words "immediately before the amalgamation" are not words of limitation. They do not limit the legal responsibility. I agree with the reasoning of the Board, at page 21 of its decision, that the purpose of the four concluding words in the clause is to identify the date on which the petitioner became the beneficiary of all the property of B.C. Electric and

> on which it assumed all of that company's duties, liabilities and obligations. Those duties, liabilities and obligations did not terminate on August 20, 1965. They were ongoing and it was the clear intention of the Legislature that they be assumed by the petitioner. Therefore, any legal responsibility under the ***Waste Management Act*** that would have fallen on B.C. Electric falls on the petitioner. [para. 9; emphasis added.]

The Chambers judge found further support for his conclusion in ***R. v. Black and Decker***, *supra*, and was not persuaded that the concluding clause of the Amalgamation Agreement in the case at bar distinguished it from the reasoning in that case.

[47] This appeal was brought in May 2000, by which time the manager had been ordered by the Board to determine whether B.C. Hydro was a "responsible person" on the merits, and had determined that it was. At the time of that decision (November, 1999) some remediation work at the Oak Street site had been done, but a "significant amount" remained undone.

ANALYSIS

What Liabilities of B.C.Electric Became Liabilities of B.C. Hydro?

[48] I turn first to the submission of the respondents GCC and the Harbour Commission that the nature of a corporate amalgamation is such that all obligations and liabilities

necessarily carry through to the amalgamated corporation – despite what may be terms to the contrary in the amalgamation agreement. This raises squarely the meaning and effect of the concluding words of clause (c) of the 1965 Agreement by which B.C. Hydro came into being. For convenience, I set out again the operative part of that document:

> (1) The Authority, the Commission and the Company hereby amalgamate with each other in such a manner that
>
> (*a*) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as a established by the British Columbia Hydro and Power Authority Act, 1964,
>
> (*b*) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
>
> (*c*) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the authority, the Company and the Commission immediately before the amalgamation. [Emphasis added.]

This was followed, of course, by the Order-in-Council 'revoking' and 'cancelling' B.C. Electric's "incorporation", and declaring it to be "dissolved."

[49] At the outset, it bears noting that the rules of construction of contract mandate that the words used be construed in their plain and ordinary sense and that "the literal meaning must be given to the language of the contract unless this would result in an absurdity." (See Fridman, ***The Law of Contract in Canada,*** 1994, at 454). A contract, like a statute, should be construed as a whole, giving effect to everything in it if at all possible. (*Supra*, at 469). What then is the ordinary and natural meaning of what Mr. Spencer called the "four little words" at the end of clause (c), read in the context of the Amalgamation Agreement as a whole?

[50] It is fair to say that none of the counsel appearing before us sought to defend the idea that the purpose of the words "immediately before the amalgamation" at the end of clause (c) was to "identify the date on which [B.C. Hydro] became the beneficiary of all the property of B.C. Electric and on which it assumed all of that company's duties, liabilities and obligations." (Chambers judge, Reasons for Judgment, para. 9.) With respect, I agree it would be nonsensical to say that B.C. Hydro acquired all the properties and assumed all the obligations and liabilities of B.C. Electric "immediately before the amalgamation" when that did not happen until the moment of amalgamation. The effective

time and date of the amalgamation were in any event clearly stated in clause 2 of the Agreement, and the Order-in-Council confirmed that the amalgamation "shall become effective at the date and time provided in the amalgamation agreement" — not the moment immediately before.

[51] At the same time, Mr. Mitchell for the Harbour Commission argued strongly that the four words were not "words of limitation" but were intended to ensure a seamless continuance of B.C. Electric's assets and liabilities, or were the "flip side" of the word "thereafter" in the phrase ". . . and thereafter the amalgamated company shall be seized of and shall hold and possess . . ." appearing in statutes such as the ***Companies Act***, R.S.B.C. 1960, c. 67, at s. 178(11). This submission is indistinguishable in my view from the Chambers judge's explanation of the four words. For his part, Mr. Spencer on behalf of the C.P.R. submitted that the phrase modifies "the Authority, the Company, and the Commission" appearing immediately before. With respect, I believe there can be little doubt that as a matter of grammatical construction, the four words modify (at least) the phrase "duties, liabilities and obligations" in clause (c) of the Agreement. On an ordinary reading of the document, these words limit the duties, liabilities and obligations being

assumed. They answer the question "Which duties, liabilities and obligations are being assumed?" The answer appears to be, "All those to which B.C. Electric and the other predecessor corporations were subject immediately before the amalgamation."

[52] The respondents naturally cautioned against over-emphasizing the four words and contended that to read them as limiting the liabilities assumed by B.C. Hydro would be inconsistent with the notion that upon an amalgamation the predecessor corporations "live on" in some sense, though not as separate corporate entities. In this regard Mr. Spencer noted the words "as a separate corporation" in clause (b) of the Agreement and the reference to "continuing" as one amalgamated corporation. He relied heavily on ***Black and Decker,*** *supra*, where it was held that after an amalgamation under the ***Canada Corporations Act***, R.S.C. 1970, c. C-32, an amalgamated corporation remained liable to be prosecuted for criminal offences allegedly committed by a predecessor prior to the amalgamation. One would have been very surprised to see any other result, given that the statute (like the ***Companies Act*** at the time) provided that upon the issuance of letters patent of amalgamation, an amalgamated company was "subject to all the contracts, liabilities, debts and

obligations of each of the amalgamating companies." As Dickson J. (as he then was) noted, if Parliament had intended that a company could, by the simple expedient of amalgamating with another, free itself of accountability under the ***Combines Investigation Act*** or the ***Criminal Code***, clearer language would surely have been necessary. (At 417-8.) In the case at bar, of course, there was no attempt to rid B.C. Hydro of liabilities or obligations to which B.C. Electric was subject at the time of amalgamation: those liabilities were expressly "inherited" by B.C. Hydro.

[53] The Court went on, however, to say in ***Black and Decker***:

> Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the *Canada Corporations Act* no "new" company is created and no "old" company is extinguished. The *Canada Corporations Act* does not in terms so state and the following considerations in my view serve to negate any such inference: (i) palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition"- *Shorter Oxford English Dictionary*. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state; [at 417; emphasis added.]

and:

> If ss. 137(13)(b) and 137(14) are to be read, however, as other than merely supportive of a general principle and other than all-embracing, then some corporate incidents, such as criminal responsibility, must be regarded as severed from the amalgamating companies and outside the amalgamated company. . . . The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution. [at 422]

[54] Like s. 137 of the ***Canada Corporations Act,*** the Amalgamation Agreement in the case at bar stated that the predecessor corporations would "continue" as one corporation, which would "possess" all the assets of the predecessors. However, neither ***Black and Decker*** nor its companion case, ***Witco Chemical Co., Canada, Ltd. v. The Corporation of the Town of Oakville*** [1975] 1 S.C.R. 273, nor any of the other cases to which we were referred dealt with obligations or liabilities which were created after the date of amalgamation; nor did they deal with statutory wording similar to the terms of clause (c) of the Agreement. Thus, observations about the "blending" and "continuance" of the predecessors are not of great assistance in construing the terms of a private agreement in which the parties appear to have done what it was in their commercial interest to do – limit the liabilities

flowing through to B.C. Hydro, to those in existence at the time of amalgamation.

[55] Mr. Singleton on behalf of B.C. Hydro relied first on the four words themselves. In his submission, they limited the liabilities of B.C. Electric being assumed by B.C. Hydro under the Agreement, which was not subject to or informed by any statute of general application. If the words were unclear, he relied also on the context of the Agreement and the factual matrix in which it was written, to argue that they were intended to, and did, limit the obligations assumed by B.C. Hydro at the time of amalgamation. Obviously, this was no ordinary amalgamation, as shown by the litigation between the Province and B.C. Power Commission; the special legislation enacted in 1964-5; B.C. Hydro's immunity from most provincial enactments; and the care taken by the author of the Amalgamation Agreement and by the legislative draftsman concerning what liabilities were being assumed, what shares were being surrendered to the Province, and what the effect of the re-organization was to be on the predecessors' secured and unsecured debt obligations and commitments regarding share allotments and conversions. Mr. Singleton noted that although the language in the Amalgamation Agreement for the most part paralleled that of s. 178(11) of the ***Companies Act*** and the

counterpart provisions in the ***Canada Corporations Act*** at the time, the "four little words" distinguished this amalgamation from amalgamations under those statutes, and must be given meaning if at all possible. Last, the statutory dissolution of B.C. Electric, though perhaps redundant, could leave no doubt that it did not "live on" in any sense – formal, substantive, or metaphysical.

[56] Applying the "golden rule" that words used in a contract must be given their plain and ordinary meaning unless an absurdity would result, I cannot read the concluding words of clause (c) of the Agreement as meaning anything other than that the liabilities which B.C. Hydro was assuming at the time of amalgamation were limited – the literal and ordinary meaning, and a result consistent with the commercial interests of all three parties to the Agreement. (The concluding words may also have limited the assets being assumed, but that is irrelevant to this appeal.) The words were obviously chosen deliberately and the fact they are not "unique" in the annals of corporate precedents does not mean they are mere surplusage or were not intended to have meaning. They have the effect of protecting B.C. Hydro from any obligations other than those that would have properly appeared on the balance sheet of B.C. Electric immediately prior to the amalgamation.

[57] This result is not in my view inconsistent with the concept of an amalgamation as a "continuance" of the predecessors as one, or the flowing of three rivers into one. The three predecessors did become one and their undertakings, including existing liabilities, were merged. But as stated in ***Black and Decker*** at 420, the word "amalgamation" is not a legal term and is "not susceptible of exact definition." (In this regard see, e.g., ***Re South African Supply and Cold Storage Co.*** [1904] 2 Ch. 268 and ***Re Seaboard Life Insurance Co. and Attorney General of British Columbia*** (1986) 30 D.L.R. (4th) 264 (B.C.S.C.).) At the end of the day, as Dickson J. stated in ***Black and Decker,*** the statute under which the amalgamation is authorized will govern. In this case, the ***British Columbia Hydro and Power Authority Act, 1964*** empowered the Authority to amalgamate "in any manner" with other corporations, and it was in B.C. Hydro's interest and indeed the public interest not to have the amalgamated corporation assume more obligations than it intended to assume. The amalgamation was not carried out under B.C. Electric's constating statute, the ***Companies Act***, presumably so that it would not be subject to the 'usual' provisions. This was an exceptional case, to which a great deal of legislative attention was devoted. The predecessor corporations ceased to

exist as such, and in case there was any doubt on the point, B.C. Electric was also dissolved, and its certificate of incorporation was cancelled, by special order. In my opinion, it is not tenable to maintain that B.C. Electric lived on in some sense sufficient to attract liability for an obligation arising more than 30 years later.

Alternate Conclusion

[58] Before leaving this part of the analysis, I note my alternate conclusion that even if the Amalgamation Agreement had not contained the 'limiting' words in clause (c), B.C. Hydro could not be brought within the definition of "responsible person" in Part 4. "Responsible person" refers to a "previous owner or operator of the site": s. 26.5(1)(b). The term "operator" means "a person who is or was in control of or responsible for" operations at the site, and "owner" means "a person" who has certain possessory or other rights in the property. The term "person" is not defined to include bodies corporate that previously existed but no longer exist. It is obvious that B.C. Hydro itself was never in control of any operation at the site, and never was in possession of or in occupation or control of the property. Is B.C. Electric "a person who is or was" in control or in possession of rights in

the property? Counsel did not address this question directly, but if my views expressed above on the meaning of the "four little words" were incorrect, it might be helpful for me to do so for purposes of any further appeal.

[59] In my opinion, regardless of the effect of the four words, it cannot now be said that B.C. Electric is a "person" as required by the definitions of "owner" and "operator". Under the Amalgamation Agreement and the Order-in-Council of August 20, 1965, B.C. Electric ceased to exist as a separate corporation, and under the Order-in-Council of August 23, 1965, its incorporation was "revoked and cancelled" and it was "declared to be dissolved." Whatever happened to its assets, undertaking and liabilities, B.C. Electric is no longer a "person" — i.e., a body corporate that may sue and be sued.

[60] I reach this conclusion notwithstanding ***Black and Decker*** and ***Witco***, *supra*. In the latter case, the Court ruled that a corporation which had amalgamated with another effective as of the day after it had issued a writ against the defendants, should be permitted to amend its writ and statement of claim — even though a limitation period would have barred the action against one of the defendants in the interim. The Court, *per* Spence J., emphasized that the "error" of the plaintiff had

been *bona fide* and that no defendant had been misled or prejudiced by the plaintiff's "error". He therefore allowed the appeal. Having done so, he went on in *obiter* to note the wording of the amalgamation provisions of the Ontario statute (which was almost identical to that considered in ***Black and Decker***, discussed at para. 52 above), and expressed the opinion that the statute "ha[d] a strong indication that the corporate entity Witco Chemical Company, Canada, Limited, did continue to exist as a corporate entity despite the fact that by s. 197(4)(a) and (b) all its powers had passed to the amalgamated corporation." (At 282-3.) In the end, "there was not an extinguishment of the corporate identity of [Witco] sufficient to justify the Court in holding that the writ had been issued in the name of a non-existent plaintiff." (At 283-4.) The opposite seems true in the case at bar, where the Order-in-Council of August 23, 1965 could not have been clearer in extinguishing B.C. Electric's corporate identity or 'personhood', and where there was no statutory wording comparable to the wording of Ontario's ***Business Corporations Act*** or the wording at issue in ***Black and Decker***.

[61] On their face, then, the terms "previous owner or operator" and "responsible person" do not in my opinion reach corporations such as B.C. Electric which have ceased to exist,

either by being wound up (and not revived under applicable legislation) or dissolved in some other way. Is there some other aspect of Part 4 that mandates a different conclusion? I turn next to that question, which I will address on the understanding that whether B.C. Electric is now a "person", it would be open to the Legislature to attach a liability or obligation to it as of some point prior to 5:00 p.m. on August 20, 1965, which liability would have attached at that time to B.C. Hydro, making B.C. Electric's present lack of 'personhood' irrelevant.

Does the Waste Management Act have the effect of making B.C. Electric a "responsible party" immediately before the amalgamation?

[62] Proceeding on the assumption that the "four little words" do have the effect I have stated, does the ***Waste Management Act*** operate so as to fasten B.C. Electric with the obligations of a "responsible person" as at the moment immediately before its amalgamation in 1965? This question raises squarely the distinction between the retrospective and retroactive operation of statutes. The distinction has gained recognition in Canada due in large part to the writing of Professor Driedger, the author of the first and second editions of

Construction of Statutes. Professor Driedger stated the distinction succinctly in his 1978 article, *supra*:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards.* A retrospective statute *operates forward*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [at 268-9; emphasis added.]

In so writing, Professor Driedger would appear to have articulated the reasoning of Dickson J. for the majority of the Court in ***Gustavson Drilling (1964) Ltd. v. M.N.R.*** (1975) 66 D.L.R. (3d) 449, at 460. (In England, the judgment of Buckley, J. in ***West v. Gwynne*** [1911] 2 Ch. 1 (C.A.), at 11-12, was evidently pivotal in making this distinction.) In the second edition of ***Construction of Statutes***, Driedger elaborated further:

> A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative

> with respect to past transactions as of a past time, as, for example, the Act of Indemnity considered in *Phillips v. Eyre*. A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment. Thus, for example, the Act to amend the Customs Tariff, S.C. 1969-70, c. 6, assented to on December 19, 1969, provided that the amendments to the Customs Tariff should be deemed to have come into force on June 4, 1969 (the date of the Budget Speech of the Minister of Finance) and to have applied to goods imported after that day; thus, a new and higher rate of duty was applied to past transactions as of a past time, namely, importations prior to the date the Act was enacted.
>
> A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. As Lord Goddard said in *Re a Solicitor's Clerk* [[1957] 1 W.L.R. 1219, at p. 1223] an Act is retrospective if it
>
> > provided that anything done before the Act should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force....
>
> A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future. [at 186; emphasis added.]

(With respect to the first underlined emphasized sentence above, I note that the ***Waste Management Act*** does not contain any statement of a specific time prior to its enactment when it was intended to change the law. Counsel for the Attorney General suggested that the ***Act*** should be taken as being

retroactive to the date on which British Columbia entered Confederation.)

[63] Although many writers and courts use the words "retroactive" and "retrospective" interchangeably, the distinction suggested by Driedger has been adopted on many occasions by this court, including ***Bera v. Marr*** (1986) 27 D.L.R. (4th) 161, ***MacKenzie v. British Columbia (Commissioner of Teachers' Pensions)*** (1992) 69 B.C.L.R. (2d) 227, at paras. 11-14, and ***Hornby Island Trust Committee v. Stormwell*** (1988) 30 B.C.L.R. (2d) 383, where Lambert J.A. said for the Court:

> A retroactive statute operates forward in time, starting from a point further back in time than the date of its enactment; so it changes the legal consequences of past events as if the law had been different than it really was at the time those events occurred. A retrospective statute operates forward in time, starting only from the date of its enactment; but from that time forward it changes the legal consequences of past events. [at 389-90]; emphasis added.]

(See also Lambert J.A. (in dissent on another point) in ***Johnstone v. Wright*** [2002] B.C.J. No. 1422, at para. 5.)

[64] In the third edition of ***Construction of Statutes,*** edited by Professor R. Sullivan, she notes a "growing confusion around the term 'retrospective' in Canadian case law." She writes that the word "retroactive" is ambiguous:

> ***Two meanings of "retroactive legislation".*** To say of legislation that it is retroactive is an ambiguous statement. It might mean that the legislation itself is retroactive, that is, it is intended to operate retroactively as evidenced by provisions that expressly make it applicable to the past. This is the sense intended by Beetz J. when he said, in *Venne v. Quebec (Commission de protection du territoire agricole)*, that "[t]rue retroactivity can generally be seen simply from reading a statute". Because it is strongly presumed that legislation is not intended to operate retroactively, statements rebutting the presumption tend to be obvious and clear.
>
> The statement that legislation is retroactive can also mean that, whether or not it is intended to be retroactive, its application to certain circumstances would in fact give it a retroactive effect. This is usually the sense intended when litigants claim that legislation is retroactive. They mean that its application to *them* would be retroactive and therefore presumably was not intended. Unlike retroactivity in the first sense, retroactivity in the second sense cannot be seen simply from reading the statute. Recognizing whether a given application of legislation is retroactive is often a difficult judgment. [at 512]

[65] Professor Sullivan avoids using the term "retrospective" altogether in her analysis, which uses a model developed by J.-P. Côté, dividing fact-situations into "ephemeral", "continuing" and "successive". (See Côté, ***The Interpretation of Legislation in Canada*** (2nd ed., 1991) at 279.) That nomenclature appears to have been abandoned by Côté in his third edition, published in 2000 (at 125-139) and receives less emphasis from Professor Sullivan in the fourth edition of

Driedger (2002), at 548-553. I do not propose to complicate the law in British Columbia further by departing from Professor Driedger's analysis and the jurisprudence of this court cited above. I will also pass by the interesting question, not discussed by any of the foregoing authors, of how a statutory limitation or postponement thereof would operate in connection with retrospective or retroactive legislation.

[66] Applying Driedger's terminology to the case at bar, there is no disagreement among counsel that Part 4 of the ***Waste Management Act*** is at least retrospective — i.e., that at a minimum, it changes the law from what it would otherwise be with respect to prior events. It holds previous owners and operators, as well as present ones, responsible, and secured creditors who "at any time" exercised control over the treatment or disposal of a substance which resulted in contamination. The liability provision (s. 27(1)) applies even though the conduct in question "is or was not prohibited by any legislation", and despite the terms of any "cancelled, expired, abandoned or current permit or approval or waste management plan. . . ." Thus it seems clear the perceived deficiencies of the previous legislation revealed by cases such as ***Rempel–Trail*** and ***B.C. Railway v. Driedger***, *supra*, are

cured – the ***Act*** "reaches back into the past" in the sense that it attaches responsibility to past events or conduct. As I have already mentioned, counsel for B.C Hydro therefore conceded that if B.C. Electric were still in existence, it would be subject to being named as a responsible person by reason of its activities in and about the Oak Street site between 1920 and 1954. But does Part 4 operate retroactively such that B.C. Electric can be said to have been a "responsible" person as of 4:59 p.m. on August 20, 1964? Does Part 4 make the law different from what it was at that time?

[67] As noted earlier, Professor Driedger states that a retroactive statute is "easy to recognize" since it must contain a provision that changes the law as of a time prior to its enactment." (See also Côté, *supra*, 3rd ed., at 127.) The ***Waste Management Act*** as a whole does not contain any statement that it is meant to apply as of a date earlier than April 1, 1997, nor that it shall be deemed always to have been law, or that it has always been the law. The only express reference in Part 4 to retroactivity is the word "retroactively" in s. 27(1), which applies to the liability of persons "who are responsible for remediation" of a contaminated site — a phrase which all counsel assumed, correctly in my view, is meant to refer to "responsible persons" as defined by s. 26.5(1). The

definition does not suggest that such persons "are and have always been" responsible persons or that they "are and have since British Columbia entered Confederation, been" responsible for remediation. Nor is any reference made to the predecessor corporations of previous or present owners or operators, or to the estates of deceased owners or operators.

[68] Does retroactive operation arise by necessary implication? B.C. Hydro argues that the presumption against retroactivity answers this question in the negative. The presumption, which applies both to the retroactive and retrospective operation of statutes, is founded in the belief that legislation of this kind infringes on the rule of law and is unfair. Professor Sullivan states the reasons for the presumption most strongly:

> ***The reasons for presumption.*** Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible. As Raz points out, the fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. [J. Raz, "The Rule of Law and its Virtue" in *The Authority of* Law (New York: Oxford University Press, 1979).] By definition, a retroactive law is unknowable until it is too late.

> No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is not only arbitrary but also unfair. Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.
>
> In short, retroactive legislation is undesirable because it is arbitrary and because it tends to be unfair. [at 513]

(See also Côté, *supra*, 3rd ed., at 148; Driedger, *supra*, 2nd ed., at 185; M. McDonald, *An Enquiry into the Ethics of Retrospective Liability: The Case of British Columbia's Bill 26*, (1995) 29 ***U.B.C. Law Rev.*** 63; and R. Crowley and F. Thompson, *Retroactive Liability, Superfund and the Regulation of Contaminated Sites in British Columbia*, at p. 87 of the same volume, especially at 110.)

[69] However, the presumption does not apply in all cases. Professor Driedger, in a passage approved by the Supreme Court of Canada in ***Brosseau v. Alberta Securities Commission*** [1989] 1 S.C.R. 301, at 318-19, explains:

> . . . there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract

> the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption. [at 198]

[70] L'Heureux-Dubé, J. summarized this passage of ***Brosseau*** by saying the presumption applies "only to prejudicial statutes" (p. 318), and that since the statutory amendment under consideration in ***Brosseau*** was "designed to protect the public, the presumption . . . [was] effectively rebutted" (p. 321). As noted by Professor Sullivan (*supra*, 4th ed., at 561), the latter comment of L'Heureux-Dubé J. was, with respect, perhaps misleading: the presumption is not rebutted simply by showing that the purpose of a provision is to protect the public. The emphasis is not on the intention or motivation of the Legislature, but on the consequences attached by the legislation to the past acts or conduct. Moreover, as Mr. Singleton argued, virtually every statute is designed to protect the public or the public interest in some way. Obviously, the ***Waste Management Act*** is intended to do so. But Part 4 clearly does not attach "benevolent consequences" to prior events. It attaches new liabilities to conduct (even conduct expressly authorized under permits issued by the

Crown) that previously did not attract liability; and that consequence is "prejudicial" to those affected, though perhaps not "punitive" or "penal".

[71] I have little doubt that the presumption applies to Part 4. But since it applies to both retroactive and retrospective legislation (though with less force to the latter: see Driedger, *supra*, 2nd ed., at 197-8), it is in any event not of great assistance to the question being addressed in this case. So, setting aside the presumption and considering only that a statute generally speaks prospectively, I return to whether Part 4 or the definition of "responsible person" in s. 26.5 is by implication to be read retroactively to some point in time prior to August 20, 1965. In answering this question, counsel for the Attorney General said that recent cases have shown a "policy trend" towards recognizing the desirability of environmental protection and remediation. This argument was not helpful, assuming as it does that the meaning and operation of statutes may or should be decided by judges on the basis of the laudability (in their opinion) of the policy objective in question. Mr. Singleton, counsel for B.C. Hydro, rightly responded that the role of the courts is to interpret the law, including statutes, in accordance with recognized

rules of law and that if the meaning of a statute is clear, a court must give effect to it.

[72] At the same time, s. 8 of the ***Interpretation Act***, R.S.B.C. 1996, c. 238, states that every enactment must be construed as being remedial and must be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Further, the "modern" approach to statutory construction (endorsed on many occasions by the Supreme Court of Canada) tells us that "the words of an Act should 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." (Driegder, 2nd ed., *supra*, at 87.) In this regard, the Attorney General submitted in his factum that the express words of the ***Waste Management Act*** clearly show a legislative intent that all the provisions of Part 4 be interpreted retroactively and that such interpretation is necessary to give effect to the purposes of Part 4. The primary purpose of Part 4, Ms. Rowbotham argued, is the "expeditious remediation of contaminated sites", which purpose would be undermined "if the Ministry [of the Environment] was limited as to the parties it could order to remediate a property." More specifically:

> . . . to hold that a person could be retroactively liable in a private cost recovery action for remediation, but could not be retroactively responsible for causing the contamination, would rob even the private cost recovery action of its intent. The private cost recovery is designed to enable persons who incur remediation costs to recover those costs from *anyone* who caused or contributed to the contamination. However, these persons are described in s. 27(4) as 'responsible persons'. If responsibility is not retroactive under a remediation order, then the pool of persons liable under s. 27(4) would be similarly restricted.

[73] With respect, I am not persuaded that Part 4 must be given retroactive, as opposed to retrospective, operation to achieve its apparent purpose of subjecting a large class of persons to remediation obligations. As already noted, Part 4 undoubtedly "reaches into the past". It fastens responsibility on previous owners and operators of contaminated sites and persons who transported or arranged for the transport of contaminating substances at some time in the past, i.e., prior to April 1, 1997. Presumably, Part 4 permits the recovery of remediation costs incurred before that date. In Driedger's terminology, new "prejudicial consequences" are attached to completed transactions or events. The reasoning in ***Rempel–Trail*** and ***B.C. Railway v. Driedger***, *supra,* is no longer tenable. Furthermore, once a person has been shown to be a "responsible person" as defined, his or her liability under s. 27(1) is very arguably – we need

not finally decide the point in this case – retroactive, although when it is retroactive to is unclear. (Since as already mentioned, a plaintiff suing under s. 27(1) must have incurred remediation costs, it may be that the liability dates back to when the costs were incurred. I leave this issue to be resolved on another day.) But with respect to the Attorney General's submission that "to be liable is to be responsible", it must be remembered that under Part 4, liability follows responsibility. The statute clearly contemplates that before one may be "liable" under s. 27(1), he or she must be a "responsible person" as defined by s. 26.5.

[74] In summary, Part 4 casts a very wide net indeed, both in terms of past events and in terms of persons caught by the definition of "responsible person." It cannot be said, in my opinion, that its objects would be undermined unless the definition also operated retroactively. Indeed, I consider that in drafting the ***Act*** to operate retrospectively, the draftsman must have attained the Legislature's main objective and that cases in which retroactive operation would yield many practical results would be very rare indeed.

[75] By the same token, if all of Part 4 or the definition of "responsible person", did operate retroactively, the

implications would be breathtaking in terms of legal theory. Any individual or body corporate who had contributed to the contamination of real property in British Columbia since the time it entered Confederation would be caught in the net as of the time of the contamination. Individuals have died, estates and corporations have been wound up, businesses and properties have been bought and sold, financial statements have been relied upon — the finality of a host of transactions and representations would be cast into doubt by a statute that imposes liability retroactively to 1871 — subject, I suppose, to any bar arising under the ***Limitation Act*** (concerning which we received no submissions). Quite apart from any presumption of construction, this fact should cause any court to require that clear language be used to effect such a result.

[76] In short, I agree with Deputy Director Driedger, who stated in his reasons:

> . . . for the purpose of the power to issue a remediation order in s. 27.1(1() of the Act, the definitions of responsible person in the 1993 amendments to the *Waste Management Act* are not retroactive. Nothing in the language of s. 26.5 suggests that definitions operate backward in time and change the law from what it was in 1965. The provisions are instead a clear example of retrospective legislation which — in relation to the definition of responsible person – operates for the future but in so doing imposes new legal consequences in respect of past actions, events or

> status. Thus, on April 1, 1997, a person who was a past or present owner or operator of a contaminated site, or a person who in the past was a producer or transporter, became a responsible person subject to a remediation order. While the effect of the amendments was to dramatically expand in the present the responsibility of persons for their past actions or status, the amendments do not change the law as it existed before the legislation came into force.
>
> [Emphasis added.]

(I note that in an article entitled "*Retrospectivity in Law*" (1995) 29 ***U.B.C. Law Rev.*** 5, Professor E. Edinger takes a similar view concerning Part 4 (see paras 10–12), as does Professor M. McDonald, *ibid*, at 63-71.)

[77] It follows in my judgement that B.C. Electric cannot be said to have been a "responsible person" as at 4:59 p.m. on August 20, 1965 or to have had a liability under s. 27(1) of the ***Waste Management Act*** at that time. As well, for the reasons stated earlier, it is my view that B.C. Hydro assumed only the obligations and liabilities to which B.C. Electric was subject immediately before the amalgamation in 1964, and alternately, that even had B.C. Electric amalgamated in the 'usual way', it cannot now be said to be a "person" as required by the chain of statutory definitions encompassed by the term "responsible person" in Part 4. I would allow the

appeal and reinstate the decision of the Deputy Director dated October 15, 1998 as it relates to B.C. Hydro.

[78] We are indebted to counsel for their able arguments.

"The Honourable Madam Justice Newbury"

APPENDIX A

Waste Management Act

Part 4 - Contaminated Site Remediation

Division 3 — Liability

Persons responsible for remediation at contaminated sites

26.5 (1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:

(a) a current owner or operator of the site;

(b) a previous owner or operator of the site;

(c) a person who

(i) produced a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(d) a person who

(i) transported or arranged for transport of a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(e) a person who is in a class designated in the regulations as responsible for remediation.

(2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation at a contaminated site that was contaminated by migration of a substance to the contaminated site:

(a) a current owner or operator of the site from which the substance migrated;

(b) a previous owner or operator of the site from which the substance migrated;

(c) a person who

(i) produced the substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site;

(d) a person who

(i) transported or arranged for transport of the substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site.

(3) A secured creditor is responsible for remediation at a contaminated site if

(a) the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site, or

(b) the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site,

but a secured creditor is not responsible for remediation if it acts primarily to protect its security interest, including, without limitation, if the secured creditor

(c) participates only in purely financial matters related to the site,

(d) has the capacity or ability to influence any operation at the contaminated site in a way that would have the effect of causing or

increasing contamination, but does not exercise that capacity or ability in such a way as to cause or increase contamination,

(e) imposes requirements on any person if the requirements do not have a reasonable probability of causing or increasing contamination at the site, or

(f) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take.

Persons not responsible for remediation

26.6 (1) The following persons are not responsible for remediation at a contaminated site:

(a) a person who would become a responsible person only because of an act of God that occurred before the coming into force of this section and who exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(b) a person who would become a responsible person only because of an act of war and who exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(c) a person who would become a responsible person only because of an act or omission of a third party, other than

(i) an employee,

(ii) an agent, or

(iii) a party with whom the person has a contractual relationship,

if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(d) an owner or operator who establishes that

(i) at the time the person became an owner or operator of the site,

(A) the site was a contaminated site,

(B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and

(C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,

(ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and

(iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

(e) an owner or operator who owned or occupied a site that at the time of acquisition was not a contaminated site and during the ownership or operation the owner or operator did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;

(f) a person described in section 26.5 (1) (c) or (d) or (2) (c) or (d) who

(i) transported or arranged to transport a substance to a site if the owner or operator of the site was authorized by or under statute to accept the substance at the time of its deposit, and

(ii) received permission to deposit the substance from the owner or operator described in subparagraph (i);

(g) a government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body caused or contributed to the contamination of the site;

(h) a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion;

(i) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person;

(j) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;

(k) subject to subsection (2), a government body that possesses, owns or operates a roadway, highway or right of way for sewer or water on a contaminated site, to the extent of the possession, ownership or operation;

(l) a person who was a responsible person for a contaminated site for which a conditional certificate of compliance or a certificate of compliance was issued and for which another person subsequently proposes or undertakes to

(i) change the use of the contaminated site, and

(ii) provide additional remediation;

(m) a person who is in a class designated in the regulations as not responsible for remediation.

(2) Subsection (1) (k) does not apply with respect to contamination placed or deposited below a roadway, highway or right of way for sewer or water by the

government body that possesses, owns or operates the roadway, highway or right of way for sewer or water.

(3) A person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

General principles of liability for remediation

27 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

(2) For the purpose of this section, **"costs of remediation"** means all costs of remediation and includes, without limitation,

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 26.4 as to whether or not the site is a contaminated site,

(c) legal and consultant costs associated with seeking contributions from other responsible persons, and

(d) fees imposed by a manager, a municipality, an approving officer, a division head or a district inspector under this Part.

(3) Liability under this Part applies

(a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and

(b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated

operational certificate that authorizes the discharge of waste into the environment.

(4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

Remediation orders

27.1 (1) A manager may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do all or any of the following:

(a) undertake remediation;

(b) contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation;

(c) give security in an amount and form, which can include real and personal property, subject to conditions the manager specifies.

(3) When considering whether a person should be required to undertake remediation under subsection (2), a manager may determine whether remediation should begin promptly, and must particularly consider the following:

(a) adverse effects on human health or pollution of the environment caused by contamination at the site;

(b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;

(c) the likelihood of responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;

(d) in consultation with the chief inspector appointed under the *Mines Act,* the requirements of a reclamation permit issued under section 10 of that Act;

(e) in consultation with a division head under the *Petroleum and Natural Gas Act,* the adequacy of remediation being undertaken under section 84 of that Act;

(f) other factors, if any, prescribed in the regulations.

(4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements

(a) take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and

(b) on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such as

(i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and

(ii) the diligence exercised by persons with respect to the contamination.

(5) A remediation order does not affect or modify the right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a contaminating substance.

(6) If a remediation order or a pollution abatement order requiring remediation under section 31 is issued, and a manager has not yet determined if a site is a contaminated site under section 26.4, the manager must, as soon as reasonably possible after the issuance of the order,

(a) determine whether the subject site is a contaminated site, in accordance with section 26.4, and

(b) make a ruling as to whether the person named in the order is a responsible person under section 26.5,

and if the person is not found to be a responsible person under paragraph (b), the manager making the order must compensate, in accordance with the regulations, the person for any costs directly incurred by the person to comply with the order.

(7) A person receiving a remediation order under subsection (1) or actual notice of a remediation order under subsection (11) must not, without the consent of a manager, knowingly do anything that diminishes or reduces assets that could be used to satisfy the terms and conditions of the remediation order, and if the person does so, the manager, despite any other remedy sought, may commence a civil action against the person for the amount of the diminishment or reduction.

(8) A manager may provide in a remediation order that a responsible person at a contaminated site is not required to begin remediation for a specified period of time if the contaminated site does not present an imminent and significant threat or risk to

(a) human health, given current and anticipated human exposure, or

(b) the environment.

(9) A person who has submitted a site profile under section 26.1 (8) must not directly or indirectly diminish or reduce assets at a site designated in the site registry as a contaminated site, including, without limitation,

(a) disposition of real or personal assets, or

(b) subdivision of land

until he or she requests and obtains written notice from a manager that the manager does not intend to issue a remediation order, and if the manager gives notice of the intention to issue a remediation order, or if the manager issues a remediation order, subsection (7) applies.

(10) A manager may amend or cancel a remediation order.

(11) A manager making a remediation order must, within a reasonable time, provide notice of the order in writing to every person holding an interest with respect to the contaminated site that is registered in the land title office at the time of issuing the order.

Allocation panel

27.2 (1) The minister may appoint up to 12 persons with specialized knowledge in contamination, remediation or methods of dispute resolution to act as allocation advisors under this section.

(2) A manager may, on request by any person, appoint an allocation panel consisting of 3 allocation advisors to provide an opinion as to all or any of the following:

(a) whether the person is a responsible person;

(b) whether a responsible person is a minor contributor;

(c) the responsible person's contribution to contamination and the share of the remediation costs attributable to this contamination if the costs of remediation are known or reasonably ascertainable.

(3) When providing an opinion under subsection (2) (b) and (c), the allocation panel must, to the extent of available information, have regard to the following:

(a) the information available to identify a person's relative contribution to the contamination;

(b) the amount of substances causing the contamination;

(c) the degree of toxicity of the substances causing the contamination;

(d) the degree of involvement by the responsible person, compared with one or more other responsible persons, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) the degree of diligence exercised by the responsible person, compared with one or more other responsible persons, with respect to the substances causing contamination, taking into account the characteristics of the substances;

(f) the degree of cooperation by the responsible person with government officials to prevent any harm to human health or the environment;

(g) in the case of a minor contributor, factors set out in section 27.3 (1) (a) and (b);

(h) other factors considered relevant by the panel to apportioning liability.

(4) A manager may require, as a condition of entering a voluntary remediation agreement with a responsible person, that the responsible person, at his or her own cost, seek and provide to the manager an opinion from an allocation panel under subsection (2).

(5) A manager may consider, but is not bound by, any allocation panel opinion.

(6) Work performed by the allocation panel must be paid for by the person who requests the opinion.

Minor contributors

27.3 (1) A manager may determine that a responsible person is a minor contributor if the person demonstrates that

(a) only a minor portion of the contamination present at the site can be attributed to the person,

(b) either

(i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or

(ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and

(c) in all circumstances the application of joint and several liability to the person would be unduly harsh.

(2) When a manager makes a determination under subsection (1) that a responsible person is a minor contributor, the manager must determine the amount or portion of remediation costs attributable to the responsible person.

(3) A responsible person determined to be a minor contributor under subsection (1) is only liable for remediation costs in an action or proceeding brought by another person or the government under section 27 up to the amount or portion specified by a manager in the determination under subsection (2).

APPENDIX B

Amalgamation Agreement

SCHEDULE

THIS AGREEMENT is made the 20th day of August, 1965,

Between:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY, established by the British Columbia Hydro and Power Authority Act, 1964, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Authority"),

AND

BRITISH COLUMBIA POWER COMMISSION, established by the Power Act, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Commission"),

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED, a company incorporated under the laws of British Columbia, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Company").

WHEREAS, by Order in Council made on the 20th day of August, 1965, pursuant to section 14(1) of the British Columbia Hydro and Power Authority Act, 1964, and pursuant to section 9(1) of the Power Measures Act, 1964, and pursuant to all other powers thereunto enabling, approval has been given to the Authority, the Commission and the Company having power to amalgamate with each other in the manner therein set out;

AND WHEREAS by the said Order in Council the procedure to be followed for effecting such amalgamation is prescribed to be by agreement between the Authority, the Commission and the and the Company;

NOW THEREFORE THIS AGREEMENT WITNESSES THAT:

(1) The Authority, the Commission and the Company hereby amalgamate with each other in such a manner that

(*a*) they continue as one amalgamated corporation which is the British Columbia Hydro and Power

Authority as established by the British Columbia Hydro and Power Authority Act, 1964,

(*b*) the Company and the Commission cease to exist as separate corporations, and

(*c*) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation.

(2) This agreement and the amalgamation effected hereby are effective at and from 5 p.m. local time in Vancouver, British Columbia, on Friday, the 20th day of August, 1965.

IN WITNESS WHEREOF this agreement has been executed by the parties hereto.

The Common Seal of BRITISH COLUMBIA HYDRO AND POWER AUTHORITY was hereto affixed in the presence of:
"G.M. Shrum" [SEAL]
Chairman.
"P.R. Kidd"
Assistant Secretary.

The official seal of BRITISH COLUMBIA POWER COMMISSION was hereto affixed in the presence of:
"H.L. Keenleyside" [SEAL]
Chairman.
"P.R. Kidd"
Secretary.

The Common Seal of BRITISH COLUMBIA ELECTRIC COMPANY LIMITED was hereto affixed in the presence of:
"G.M. Shrum" [SEAL]
Chairman.
"P.R. Kidd"
Assistant Secretary.

APPENDIX C

Order-in-Council No. 2386

Approved and ordered this 20th day of August, A.D. 1965.

"George R. Pearkes"
Lieutenant-Governor.

At the Executive Council Chamber, Victoria,

PRESENT:

The Honourable "W.A.C. Bennett" In the Chair.
Mr. "R.W. Bonner"
Mr. "R.G. Williston"
Mr. "E.C.T. Martin"
Mr. "W.D. Black"
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.

To His Honour
The Lieutenant-Governor in Council:

The undersigned has the honour to recommend:

THAT, pursuant to section 14(1) of the British Columbia Hydro and Power Authority Act, 1964 and pursuant to section 9(1) of the Power Measures Act, 1964 and pursuant to all other powers thereunto enabling, approval be given to the British Columbia Hydro and Power Authority established by the British Columbia Hydro and Power Authority, 1964 and to the British Columbia Electric Company Limited and to the British Columbia Power Commission having power to amalgamate with each other in such a manner that

(a) they continue as one amalgamated corporation which is British Columbia Hydro and Power Authority as

established by the British Columbia Hydro and Power Authority Act, 1964, and

(b) the said British Columbia Electric Company Limited and the said British Columbia Power Commission cease to exist as separate corporations, and

(c) the said British Columbia Hydro and Power Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise and subject to the Power Measures Act, 1964 be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the said British Columbia Hydro and Power Authority, British Columbia Electric Company Limited and British Columbia Power Commission immediately before the amalgamation:

AND THAT the procedure for effecting such amalgamation shall be as follows:-

(a) British Columbia Hydro and Power Authority, established by the British Columbia Hydro and Power Authority Act, 1964, British Columbia Electric Company Limited, and British Columbia Power Commission, shall enter into an agreement providing for the amalgamation; and

(b) the amalgamation effected by the amalgamation agreement shall become effective at the date and time provided in the amalgamation agreement.

DATED this 20th day of August A.D. 1965

"W.A.C. Bennett"
PREMIER

APPROVED this 20th day of August A.D. 1965

"W.A.C. Bennett"
PRESIDING MEMBER OF THE EXECUTIVE COUNCIL.

APPENDIX D

Order-in-Council No. 2387

Approved and ordered this 23rd day of August, A.D. 1965.

"George R. Pearkes"
Lieutenant-Governor.

At the Executive Council Chamber, Victoria,

PRESENT:

The Honourable In the Chair.
Mr. Bennett
Mr. Bonner
Mr. Williston
Mr. Martin
Mr. Black
Mr.
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Mr.
Mr.
Mr.
Mr.
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Mr.
Mr.

To His Honour
The Lieutenant-Governor in Council:

The undersigned has the honour to report:

THAT British Columbia Electric Company Limited is a company incorporated under the Companies Act:

AND THAT by Order of the Lieutenant-Governor in Council made pursuant to the British Columbia Hydro and Power Authority Act, 1964, and the Power Measures Act, 1964, and all other powers thereunto enabling, the amalgamation of British Columbia Hydro and Power Authority established by the British Columbia Hydro and Power Authority Act, 1964, and the British Columbia Electric Company Limited and the British Columbia

Power Commission has been approved, and that by agreement made pursuant to that Order-in-Council the amalgamation aforesaid has taken place, and that the British Columbia Electric Company Limited has ceased to exist as a separate corporation:

AND THAT the Power Measures Act, 1964 provides that the Companies Act has not applied and does not apply to the British Columbia Electric Company Limited except to the extent that may be provided by Order of the Lieutenant-Governor in Council:

AND TO RECOMMEND THAT pursuant to the Power Measures Act, 1964 and all other powers thereunto enabling section 212 of the Companies Act shall apply to the British Columbia Electric Company Limited, and that pursuant to that section the incorporation of British Columbia Electric Company Limited be revoked and cancelled and that British Columbia Electric Company Limited be declared to be dissolved, and that such other provisions of the Companies Act apply to the British Columbia Electric Company Limited to the extent necessary to effect the revocation, cancellation and dissolution hereby made.

DATED this 21st day of August, A.D. 1965.

"R.W. Bonner"
ATTORNEY GENERAL.

APPROVED this 21st day of August, 1965.

"W.A.C. Bennett"
PRESIDING MEMBER OF THE EXECUTIVE COUNCIL.

Reasons for Judgment of the Honourable Madam Justice Prowse:

[79] I have had the privilege of reading, in draft form, the reasons for judgment of my colleagues. With respect, I agree with Madam Justice Newbury that the British Columbia Hydro and Power Authority ("Hydro") cannot be fixed with liability under the ***Waste Management Act***, R.S.B.C. 1996, c. 482, in these circumstances. I am also in substantial agreement with her reasons for reaching this conclusion. I would prefer not to express any view, however, with respect to her alternative basis for finding that Hydro is not liable, discussed at para. 6, and paras. 58-60 of her draft, since this point was not raised, or addressed, by the parties.

[80] While I take no issue with Madam Justice Rowles' discussion of the general law of amalgamation and the application of ***R. v. Black and Decker Manufacturing Co.***, [1975] 1 S.C.R. 411 as a general rule, I agree with Newbury J.A. that neither the general law of amalgamation nor the ***Black and Decker*** decision governs the result in this case. As counsel noted at the outset of this appeal, the resolution of this case turns primarily on the Agreement between the parties, with particular emphasis on the words "immediately before the amalgamation" in clause (c) of the Agreement.

[81] Madam Justice Rowles directly addresses the meaning of this phrase in para. 115 of her reasons where she states that "saying that the new enterprise has the obligations of the old as they existed 'immediately before the amalgamation', is no different in substance from saying that 'thereafter' (meaning after amalgamation) the new enterprise has all the obligations of the old." For the reasons given by Newbury J.A., I am unable to agree with this interpretation.

[82] I also note that the spectre of companies at large avoiding liability to third parties through amalgamation is effectively precluded by various legislation governing amalgamations, including the ***Company Act***, R.S.B.C. 1996, c. 62, the ***Business Corporations Act***, S.B.C. 2002, c. 57 [not yet enacted], and the ***Canada Business Corporations Act***, R.S.C. 1985, c. C-44. It is only because Hydro is not subject to such legislation, because of the specific wording of this Agreement, and because of the other factors mentioned by Newbury J.A., that the result in this case, which I agree is anomalous, could occur. In other words, this case is not of precedential value.

[83] In the result, I, too, would allow the appeal and reinstate the decision of the Deputy Director dated October 15, 1998, as it relates to Hydro.

"The Honourable Madam Justice Prowse"

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[84] This is an appeal from the order of Mr. Justice Low dated 6 April 2000, dismissing a petition brought by the appellant, the British Columbia Hydro and Power Authority, for judicial review of a decision of the Environmental Appeal Board ("EAB") dated 23 August 1999. The EAB decided that the appellant could be held liable for the pre-amalgamation actions of the British Columbia Electric Company ("B.C. Electric") and could be named as a "responsible person" under Part 4, the contaminated site remediation provisions, of the ***Waste Management Act***, R.S.B.C. 1996, c. 482.

[85] The effect of the dismissal of the appellant's petition for judicial review was to uphold the order made by the EAB adding the appellant to a Remediation Order under the ***Waste Management Act*** on account of activities of B.C. Electric that pre-dated the amalgamation of the British Columbia Hydro and Power Authority, the British Columbia Power Commission, and B.C. Electric.

[86] I have had the advantage of reading the draft reasons for judgment of Madam Justice Newbury. With respect, I am unable

to agree with my colleague's analysis and conclusion that as a result of the 1965 Amalgamation Agreement and the statute ratifying the amalgamation, the appellant became subject only to those liabilities and obligations of B.C. Electric that existed "immediately before the amalgamation". Instead, I am of the view that under the Amalgamation Agreement, which was subsequently ratified by the ***Power Measures Act, 1966***, S.B.C. 1966, c. 38, the appellant became fixed with the liabilities to which B.C. Electric would have been subject had it not amalgamated with the other entities.

II. Overview of the appellant's arguments

[87] In essence, the appellant argues that it was given special protection by statute from the actions of the three amalgamating companies. No convincing rationale for such immunity is offered, but it is said to be available because of the language of the Amalgamation Agreement and the subsequent Order-in-Council approving the amalgamation. The appellant posits that the language used dictates the result.

[88] The appellant seems to suggest in its factum that the government was seeking to minimize the potential risk of the newly amalgamated company encountering liability for the actions of the three amalgamating entities. In my view, a

plain reading of the Amalgamation Agreement and the enabling legislation does not support that suggestion. The language used in the Agreement and in the Order-in-Council which followed does not suggest an intention to restrict the liabilities of the newly amalgamated corporation; rather, the words are consistent with an intention that it would possess all of the assets and be subject to all the liabilities of the amalgamating entities, without exception or restriction.

[89] The appellant has not made reference to any historical circumstances that brought about the amalgamation, or anything else that would support its suggestion that there was a concern about the possibility of the Authority finding itself saddled with liabilities as yet unknown. If such an argument were to prevail, the result would be, in my respectful view, absurd and unjust: some liabilities would be recognized while others of the same kind that had not yet matured would be denied. Similarly, it would interfere with the rights of third parties, and it would fly in the face of the generally understood common law interpretation of the effect of amalgamation on the constituent entities.

[90] As my colleague, Madam Justice Newbury, has noted, the appellant correctly conceded that if B.C. Electric were still

in existence, it would be a "responsible person" under the ***Waste Management Act*** by reason of its pre-amalgamation activities at what has since been determined to be a contaminated site. In view of that concession, and the conclusion I have reached with respect to the effect of the amalgamation, I find it unnecessary to consider the question of whether the legislature intended the ***Waste Management Act*** to have true retroactive effect.

III. Analysis

[91] Mr. Justice Low was of the view that the decision of the Supreme Court of Canada in ***R. v. Black and Decker Manufacturing Co.***, [1975] 1 S.C.R. 411, provided support for his conclusion that the words "immediately before the amalgamation" did not have the effect of limiting the appellant's legal responsibility for obligations that would have fallen on B.C. Electric under the ***Waste Management Act*** had it remained in existence. I agree with that opinion.

[92] ***Black and Decker*** is a useful place to begin. In that case, the Supreme Court considered the effect of an amalgamation under the ***Canada Corporations Act***, R.S.C. 1970, c. C-32. Three companies had agreed to amalgamate under the name Black and Decker Manufacturing Company, Limited ("Black

and Decker"). Their agreement was dated 25 January 1971 and, on the same date, letters patent were issued confirming the agreement. On 5 April 1972, an Information was sworn charging Black and Decker with two counts of retail price maintenance offences contrary to the combines investigation legislation. The offences were alleged to have occurred between October 1966 and August 1970. Black and Decker moved to quash the Information or, alternatively, for dismissal on the ground that no criminal responsibility pre-dating the 1971 amalgamation could be transferred to it. The Ontario Court of Appeal prohibited further proceedings on the Information but that order was set aside on appeal to the Supreme Court of Canada.

[93] The Supreme Court held that upon an amalgamation under the ***Canada Corporations Act***, no "new" company is created, and no "old" company is extinguished. Instead, the court held that the amalgamated companies "are amalgamated and are continued as one company". On this view, Dickson J., giving the judgment of the court, concluded that the amalgamating companies in their new identity as the amalgamated corporation remain liable to prosecution for offences committed pre-amalgamation.

[94] In this case, the British Columbia Hydro and Power Authority, the British Columbia Power Commission and B.C. Electric entered into an Amalgamation Agreement on 20 August 1965. The Amalgamation Agreement is annexed to my colleague's reasons and, consequently, there is no need to reproduce it here. As my colleague has stated, the Agreement provided that three corporations amalgamated in such a manner that:

> (*a*) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964,
>
> (*b*) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
>
> (*c*) the Authority [B.C. Hydro] shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation.

[95] The specific words in the Amalgamation Agreement before us are that the amalgamating entities will "continue as one amalgamated corporation." Those words are very similar to the words under consideration in ***Black and Decker***.

[96] In ***Black and Decker***, the Ontario Court of Appeal had reasoned that since the "new" company was not even in existence during the period covered by the dates in the Information, it could not possibly be found guilty unless it were liable for acts or omissions of the old company. The Supreme Court rejected the proposition, which had been the implicit underpinning for the Court of Appeal's decision, that the amalgamated company was somehow a different, separate, or distinct entity from the "old" companies. In doing so, Dickson J., as he then was, said (at 417):

> Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the *Canada Corporations Act* no "new" company is created and no "old" company is extinguished. The *Canada Corporations Act* does not in terms so state and the following considerations in my view serve to negate any such inference: (i) palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition": — *Shorter Oxford English Dictionary*. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state;...

[97] In my view, the words used in the Amalgamation Agreement in this case are identical, in effect, to the words used in the ***Canada Corporations Act***. The effect of an amalgamation

is, as Dickson J. described it (at 417), "that of blending and continuance as one and the selfsame company".

[98] Further, I note that the use of the term "possess" in the Amalgamation Agreement, when used in connection with the assets and undertaking of the constituent entities, is a term of continuance.

[99] The particular question before the Supreme Court in ***Black and Decker*** was whether the amalgamated company could be tried for the alleged criminal acts of one of its predecessors. The Court concluded that it could be tried. Mr. Justice Dickson determined (at 417-18) that:

> ...if Parliament had intended that a company by the simple expedient of amalgamating with another company could free itself of accountability for acts in contravention of the *Criminal Code* or the *Combines Investigation Act* or the *Income Tax Act*, I cannot but think that other and clearer language than that now found in the *Canada Corporations Act* would be necessary.

[100] In my opinion, those words apply with equal force here.

[101] In ***Black and Decker***, Dickson J. noted that the word "amalgamation" is not a legal term and is not susceptible of exact definition but is derived from mercantile usage and

denotes "a legal means of achieving an economic end". He continued (at 420-21):

> ... The juridical nature of an amalgamation need not be determined by juridical criteria alone, to the exclusion of consideration of the purposes of amalgamation. Provision is made under the *Canada Corporations Act* and under the Acts of the various provinces whereby two or more companies incorporated under the governing Act may amalgamate and form one corporation. The purpose is economic: to build, to consolidate, perhaps to diversify, existing businesses; so that through union there will be enhanced strength. It is a joining of forces and resources in order to perform better in the economic field. If that be so, it would surely be paradoxical if that process were to involve death by suicide or the mysterious disappearance of those who sought security, strength and, above all, survival in that union. Also, one must recall that the amalgamating companies *physically* continue to exist in the sense that offices, warehouses, factories corporate records and correspondence and documents are still there, and business goes on. In a physical sense an amalgamating business or company does not disappear although it may become part of a greater enterprise.
>
> There are various ways in which companies can be put together. The *assets* of one or more existing companies may be sold to another existing company or to a company newly-incorporated, in exchange for cash or shares or other consideration. The consideration received may then be distributed to the shareholders of the companies whose assets have been sold, and these companies wound up and their charters surrendered. In this type of transaction a new company may be incorporated or an old company may be wound up but the legal position is clear. There is no fusion of corporate entities. Another form of merger occurs when an existing company or a newly-incorporated company acquires the *shares* of one or more existing companies which latter companies may then be retained as subsidiaries or wound up after their assets have been passed up to

> the parent company. Again there is no fusion. But in an amalgamation a different result is sought and different legal mechanics are adopted, usually for the express purpose of ensuring the continued existence of the constituent companies. The motivating factor may be the *Income Tax Act* or difficulties likely to arise in conveying assets if the merger were by asset or share purchase. But whatever the motive, the end result is to coalesce to create a homogeneous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others.
>
> [Underlining added.]

[102] The proposition advanced by the appellant in this case is that the combined entity is in some way immune from the responsibilities of its constituent parts. That seems to me to be the opposite of what is intended by an amalgamation.

[103] ***Black and Decker*** is useful on another point as well. In that case, the Supreme Court was faced with Black and Decker's argument that if an amalgamation had the effect contended for by the prosecution, then the words used in the ***Canada Corporations Act*** (which are similar to those contained in the Amalgamation Agreement here), would be mere surplusage. The words used in s. 137(13)(b) of the ***Canada Corporations Act*** were these:

> *(b)* the amalgamated company possesses all the property, rights, assets, privileges and franchises,

> and is subject to all the contracts, liabilities, debts and obligations of each of the amalgamating companies.

[104] In responding to that argument, Dickson J. observed (at 421-22) that those words (and the words of s. 137(14)) "spell out in broad language amplification of a general principle, a not uncommon practice of legislative draftsmen." He then went on to identify the very problem which, in my view, would be created by the interpretation of the Amalgamation Agreement for which the appellant contends in this case. Dickson J. said (at 422), if the words of the statute

> ... are to be read, however, as other than merely supportive of a general principle and other than all-embracing, then some corporate incidents, such as criminal responsibility, must be regarded as severed from the amalgamating companies and outside the amalgamated company. What happens to these vestigial remnants? Are they extinguished and if so, by what authority? Do they continue in a state of ethereal suspension? Such metaphysical abstractions are not, in my view, a necessary concomitant of the legislation. The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution.
>
> [Underlining added.]

[105] Support for the conclusions reached by the EAB and Low J. as to the effect of the Amalgamation Agreement may be found in other cases as well. In ***Agrifoods International Corp. v. Beatrice Foods Inc.*** (1997), 34 B.L.R. (2d) 294, [1997] B.C.J. No. 393 (Q.L.) (B.C.S.C.) at para. 80, Spencer J. said the consequences of an amalgamation must be examined practically and, absent a juridical reason to the contrary, the amalgamation carries with it the property rights and liabilities enjoyed by the amalgamating entities.

[106] At common law, the nature of an amalgamation is such that the new corporation possesses all the property and rights of the companies the amalgamation has brought together: ***Hoole v. Advani*** (1996), 29 B.L.R. (2d) 150, [1996] B.C.J. No. 614 (Q.L.) (B.C.S.C.) at paras. 15-16, relying upon the decision of Shaw J. in ***Rossi v. McDonald's Restaurants of Canada Ltd.*** (1991), 1 B.L.R. (2d) 175, [1991] B.C.J. No. 429 (Q.L.) (B.C.S.C.). In the ***Rossi*** case, the language of the certificate of amalgamation, which was issued by the Minister under the Ontario ***Business Corporations Act*** to give effect to the amalgamation, was in identical terms to the relevant portions of the Amalgamation Agreement between the three entities in this case. The certificate provided that:

> The Amalgamated Corporation shall possess all the property, rights, privileges, franchises and other assets, and shall be subject to all the liabilities, contracts and disabilities and debts, of the Amalgamating Corporations as such exist immediately before the amalgamation."
>
> [Underlining added.]

[107] Contrary to the arguments of the appellant, there is nothing particularly unusual about the words "immediately before the amalgamation" used in the 1965 Amalgamation Agreement. The suggestion that those words must bear a special meaning limiting the liabilities assumed by the amalgamated entity because they are unique or unusual does not withstand scrutiny. It was the language used in the amalgamation certificate in ***Rossi***, *supra*. It also appears in similar form in the statute books and in texts of corporate precedents.

[108] By way of example, the precedent form of amalgamation agreement in *O'Brien's Encyclopaedia of Forms*, 10th ed., vol. 6, (Agincourt: Canada Law Book, 1980) at 310, uses this language:

> Each of the parties shall contribute to Amalco all its assets, subject to its liabilities, as of the date immediately before the date of the certificate of amalgamation.
>
> Amalco shall possess all the property, rights, privileges, and franchises and shall be subject to

> all the liabilities, contracts, disabilities and debts of each of the parties hereto as of the date immediately before the date of the certificate of amalgamation.
>
> ["Amalco" refers to the corporation continuing from the amalgamation of the three companies used in the example.]

[109] Almost identical language appears in the 1962 version of ***Canadian Corporation Precedents***, vol. 2, (Toronto: Carswell, 1962), at p. 1321, and the 1976 version, 2nd ed., vol. 3, at pp. 12—22.

[110] The amalgamation provisions of the ***Income Tax Act*** in effect at the time of this amalgamation used similar language (see, for example, ***Income Tax Act***, R.S.C. 1952, c. 148, s. 851, in *Stikeman Annotated Income Tax Act*, 1963-4).

[111] In view of the foregoing, I am far from persuaded that the words "immediately before the amalgamation" can take this case outside of the general rule that upon an amalgamation the appellant would have assumed the responsibilities of each of the three entities of which the appellant was then comprised.

[112] I am also of the view that the appellant can derive no support for its position from the rules of statutory construction. Clause 1(a) of the Amalgamation Agreement provides that the three entities amalgamate such that they

"continue" as one amalgamated corporation. Clause 1(b) provides that the individual amalgamating entities cease to exist "as separate corporations". Clause 1(c) can be broken down as follows:

> [i] the Authority
>
> [ii] shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise,
>
> [iii] and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise,
>
> [iv] of each of the Authority, the Company and the Commission
>
> [v] immediately before the amalgamation.

[113] The appellant argues that the words "immediately before the amalgamation" are words which limit the liabilities assumed by it. I do not agree with that argument.

[114] Clause 1(c) can be understood as follows: "the Authority" in subparagraph [i] above identifies the amalgamated entity; the words quoted in [iv] above describe the entities whose obligations are referred to in [ii] and [iii]; and the words in [v], "immediately before the

amalgamation", which modify the words from both subparagraphs [ii] and [iii], describe the effective time of the assumption.

[115] The words "immediately before the amalgamation" in the Amalgamation Agreement have a similar effect to the word "thereafter" in s. 178(11) of the ***Companies Act***, R.S.B.C. 1960, c. 67. They simply establish that from the time of the amalgamation, the new enterprise, for all purposes, replaces the old. Expressing that by saying that the new enterprise has the obligations of the old as they existed "immediately before the amalgamation", is no different in substance from saying that "thereafter" (meaning after amalgamation) the new enterprise has all the obligations of the old.

[116] The appellant's argument that the words "immediately before the amalgamation" are in some way words of limitation do not appear to me to be supportable. As previously noted, in an amalgamation responsibility for all the past acts of the former entities are generally assumed by and subsumed within the new entity (***Black and Decker***, *supra*). Thus, in future, if a liability arises out of something done by B.C. Electric in the past, the responsibility for the past acts of a now constituent part of the British Columbia Hydro and Power Authority would become that of the British Columbia Hydro and

Power Authority. As stated by Dickson J. in ***Black and Decker*** in relation to the construction of the statute under consideration there (at 422):

> The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be.

[117] As applied to this case, if B.C. Electric's pre-1965 activities would have made it an "operator" or a "producer", which for the purposes of Part 4 of the ***Waste Management Act*** is assumed on this appeal, then the appellant, as the combined or amalgamated company, which is the continuation of B.C. Electric, is a "responsible person" under the ***Waste Management Act***.

[118] There is nothing in the Amalgamation Agreement that requires a different result. The effect of the amalgamation is to continue the three prior entities as one combined entity. The rights, duties and obligations of each of the parts of the new entity continue unextinguished as those of the combined organization. In my view, had a limit on future liability been intended, much clearer language would have been required.

[119] I should also mention that the appellant advanced the argument that limitation of liability is a valid legislative purpose, but that argument, standing alone, does not assist. Limiting liability may be a valid legislative purpose, but clear language is needed to do so.

[120] The Amalgamation Agreement uses broad and all encompassing language to confirm the scope of the amalgamated company's responsibility. The words used do not suggest that the parties to the Agreement intended to define a class of duties, liabilities and obligations for which the appellant would not be liable. For example, instead of just the "assets" of the constituent parts, the Agreement provides that the new enterprise "shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise...."

[121] Nor does the language used suggest that the new enterprise was to assume only the debts owing at a particular point in time. Rather, the combined entity assumes "all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise...." The use of such broad

words is consistent with an intention that the obligations being assumed were complete.

[122] Similarly, the Amalgamation Agreement makes clear that it does not matter how the right or obligation was created. Regardless of whether it was created "by statute or otherwise", the obligation becomes that of the new entity.

[123] Nor is there anything in the Amalgamation Agreement that suggests that there was any limitation upon the obligations assumed. There are several drafting techniques that could easily have been used, for example, the addition of the words "but not otherwise", or other words of limitation such as "shall *only* be liable for...", or "shall have no liability except as expressly set out herein".

[124] To suggest that an amalgamation agreement could unilaterally absolve the constituent parts of the enterprise of future obligations for their past actions seems to me to be a startling proposition. No case authority has been cited by the appellant to support such a proposition.

[125] I note, as well, that nothing in the language of the Amalgamation Agreement suggests an intention that the amalgamation would extinguish the rights of third parties, yet

that would be the inevitable effect of adopting the appellant's proposition as to the effect of the words "immediately before the amalgamation". Tort liability is an example. In tort cases, the cause of action only arises when the damage occurs, is discovered, or ought to have been discovered by the plaintiff. In other words, the cause of action may well arise after the amalgamation occurred, but be the result of events occurring prior to the amalgamation. In ***Central Trust Co. v. Rafuse***, [1986] 2 S.C.R. 147 at 219, Le Dain J., for the court, held that the general rule is that a cause of action in tort "arose when damage occurred, according to the established rule", subject to the application of discoverability rule, which may further delay the accrual of the cause of action. (See also ***City of Kamloops v. Nielsen***, [1984] 2 S.C.R. 2 at 38.)

[126] On the basis of the appellant's interpretation, the amalgamated company would be immune from liability for the consequences of an act occurring before amalgamation that did not manifest itself in damage until after the amalgamation. To destroy the rights of innocent third parties in the absence of any clear statutory warrant seems to me to be unsupportable.

IV. Conclusion

[127] For the reasons I have given, I am of the view that Mr. Justice Low was correct in dismissing the appellant's judicial review petition and, thus, sustaining the decision of the EAB.

[128] In the result, I would dismiss the appeal.

"The Honourable Madam Justice Rowles"

CORECTION: October 2, 2003.

At page 56, the paragraph number "[58" is deleted.

TAB 2

The Attorney General of Canada *Appellant*

v.

CanadianOxy Chemicals Ltd., CanadianOxy Industrial Chemicals Limited Partnership and Canadian Occidental Petroleum Ltd. *Respondents*

and

The Attorney General for Ontario *Intervener*

INDEXED AS: CANADIANOXY CHEMICALS LTD. *v.* CANADA (ATTORNEY GENERAL)

File No.: 25944.

Hearing and judgment: December 10, 1998.

Reasons delivered: April 23, 1999.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Search and seizure — Search warrants — Criminal Code authorizing issuance of warrants to search for "evidence with respect to the commission of an offence" — Whether provision authorizes granting of warrants to search for and seize evidence of negligence going to defence of due diligence — Criminal Code, R.S.C., 1985, c. C-46, s. 487(1)(b).

A plant operated by the respondents discharged a quantity of chlorine into the adjacent waters, killing a number of fish. This incident occurred during a power outage at the plant, which resulted from a power line being struck by a tree. The respondents reported the discharge to the authorities and an investigation followed. Five months after the discharge, a fishery officer swore an information and obtained a warrant to search the plant for a range of documents. He later obtained an order for a new warrant to reseize several items which had been returned and which were relevant to the investigation. The respondents were charged with offences under the *Fisheries Act* and the *Waste Management Act*.

Le procureur général du Canada *Appelant*

c.

CanadianOxy Chemicals Ltd., CanadianOxy Industrial Chemicals Limited Partnership et Canadian Occidental Petroleum Ltd. *Intimées*

et

Le procureur général de l'Ontario *Intervenant*

RÉPERTORIÉ: CANADIANOXY CHEMICALS LTD. *c.* CANADA (PROCUREUR GÉNÉRAL)

N° du greffe: 25944.

Audition et jugement: 10 décembre 1998.

Motifs déposés: 23 avril 1999.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major et Binnie.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Fouilles, perquisitions et saisies — Mandats de perquisition — Délivrance des mandats de perquisition autorisée par le Code criminel en vue de rechercher des éléments de «preuve touchant la commission d'une infraction» — La disposition législative autorise-t-elle la délivrance des mandats de perquisition pour rechercher en vue de les saisir des preuves de négligence se rapportant à la défense de diligence raisonnable? — Code criminel, L.R.C. (1985), ch. C-46, art. 487(1)b).

Une usine exploitée par les intimées a rejeté du chlore dans un cours d'eau adjacent, ce qui a provoqué la mort d'un certain nombre de poissons. L'incident s'est produit pendant une panne d'électricité à l'usine causée par un arbre qui a heurté une ligne d'alimentation en électricité. Les intimées ont signalé le rejet aux autorités et une enquête a été ouverte. Cinq mois après le rejet, un agent des pêches a fait une dénonciation sous serment et a obtenu un mandat pour faire une perquisition à l'usine afin d'y rechercher différents documents. Il a obtenu par la suite un nouveau mandat pour saisir à nouveau plusieurs pièces qui avaient été remises et qui étaient pertinentes relativement à l'enquête. Les intimées ont été

They subsequently brought a motion to quash the warrants, alleging that s. 487(1) of the *Criminal Code*, which provides for the issuance of search warrants pertaining to "evidence with respect to the commission of an offence", had been exceeded. The chambers judge ruled that the documents seized pertaining to the issue of due diligence were not documents with respect to the commission of this particular offence and quashed both warrants. The Court of Appeal, in a majority decision, upheld the ruling.

Held: The appeal should be allowed.

Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur. On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. Anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant. It can be assumed that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's *prima facie* case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants. Although s. 487(1) is part of the *Criminal Code*, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that all relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the *Criminal Code* and the demands of a fair and expeditious administration of justice. Furthermore, denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system. While the broad powers contained in s. 487(1) do not authorize investigative fishing expeditions, nor do they diminish the proper privacy interests of individuals or corporations, in this case the specific terms of the warrant were not at issue, as the respondents challenged only the underlying authority to grant warrants for the purpose of investigating the presence of negligence. Both a plain reading of the relevant section and consideration of the role and obligations of state investi-

accusées d'infractions à la *Loi sur les pêches* et à la *Waste Management Act*. Elles ont par la suite présenté une requête en annulation des mandats en faisant valoir que l'on avait outrepassé les limites du par. 487(1) du *Code criminel*, qui prévoit la délivrance de mandats de perquisition relativement à des éléments de «preuve touchant la commission d'une infraction». Le juge en chambre a statué que les documents saisis relativement à la question de la diligence raisonnable n'étaient pas des documents touchant la commission de l'infraction reprochée et il a annulé les deux mandats. Les juges majoritaires de la Cour d'appel ont maintenu la décision.

Arrêt: Le pourvoi est accueilli.

Les dispositions législatives doivent être interprétées de manière à donner aux mots leur sens ordinaire le plus évident qui s'harmonise avec le contexte et l'objet visé par la loi dans laquelle ils sont employés. D'après son sens ordinaire, l'expression «preuve touchant la commission d'une infraction» est compréhensive et englobe tous les éléments qui pourraient jeter la lumière sur les circonstances d'un événement qui paraît constituer une infraction. Est visé par le mandat tout ce qui a trait ou se rapporte logiquement à l'incident faisant l'objet de l'enquête, aux parties en cause et à leur culpabilité éventuelle. Nous pouvons présumer que le législateur a décidé de ne pas limiter le par. 487(1) à la preuve établissant un élément faisant partie de la preuve *prima facie* du ministère public. Parvenir à une autre conclusion reviendrait en réalité à retrancher le mot «touchant» de la disposition. Même amputé de ce mot, le par. 487(1) est suffisamment large pour autoriser la perquisition dont il est question, mais son insertion dans la disposition appuie manifestement la validité de ces mandats. Bien que le par. 487(1) fasse partie du *Code criminel* et puisse occasionner des atteintes importantes à la vie privée, l'intérêt public commande qu'une enquête prompte et approfondie soit menée s'il y a possibilité d'infraction. C'est par rapport à cet intérêt que tous les renseignements et éléments de preuve pertinents doivent être trouvés et conservés le plus rapidement possible. Cette interprétation est compatible avec les objets qui sous-tendent le *Code criminel* et les exigences d'une administration de la justice prompte et équitable. De plus, refuser d'admettre que le ministère public peut rassembler des éléments de preuve en prévision de la présentation d'un moyen de défense aurait des conséquences graves sur le fonctionnement de notre système de justice. Bien que les pouvoirs étendus qui sont visés au par. 487(1) n'autorisent pas les recherches à l'aveuglette dans le cadre d'une enquête et ne diminuent pas le droit légitime à la vie privée des personnes physiques ou

gators support the conclusion that s. 487(1) authorized the granting of the warrants in question.

Cases Cited

Referred to: *Re Domtar Inc.* (1995), 18 C.E.L.R. (N.S.) 106; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Re Church of Scientology and the Queen (No. 6)* (1987), 31 C.C.C. (3d) 449; *R. v. Storrey*, [1990] 1 S.C.R. 241; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *Baron v. Canada*, [1993] 1 S.C.R. 416.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, s. 487(1)(*b*) [am. c. 27 (1st Supp.), s. 68; am. 1994, c. 44, s. 36].
Fisheries Act, R.S.C., 1985, c. F-14, ss. 36(3), 40(2).
Interpretation Act, R.S.C., 1985, c. I-21, s. 12.
Waste Management Act, S.B.C. 1982, c. 41, ss. 3(1.1) [ad. 1985, c. 52, s. 96], 34(3).

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APPEAL from a judgment of the British Columbia Court of Appeal (1997), 145 D.L.R. (4th) 427, 90 B.C.A.C. 126, 147 W.A.C. 126, 114 C.C.C. (3d) 537, [1997] B.C.J. No. 724 (QL), affirming a decision of the British Columbia Supreme Court (1996), 138 D.L.R. (4th) 104, 108 C.C.C. (3d) 497, [1996] B.C.J. No. 1482 (QL), quashing certain search warrants. Appeal allowed.

morales, dans la présente affaire, les modalités précises du mandat n'étaient pas en jeu, puisque les intimées ont uniquement contesté le pouvoir fondamental de décerner des mandats en vue de faire enquête sur l'existence d'une négligence. Le sens ordinaire de la disposition pertinente et la prise en compte du rôle et des obligations des enquêteurs de l'État appuient la conclusion que le par. 487(1) autorisait la délivrance des mandats en cause.

Jurisprudence

Arrêts mentionnés: *Re Domtar Inc.* (1995), 18 C.E.L.R. (N.S.) 106; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *Re Church of Scientology and the Queen (No. 6)* (1987), 31 C.C.C. (3d) 449; *R. c. Storrey*, [1990] 1 R.C.S. 241; *Nelles c. Ontario*, [1989] 2 R.C.S. 170; *R. c. Levogiannis*, [1993] 4 R.C.S. 475; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425; *Baron c. Canada*, [1993] 1 R.C.S. 416.

Lois et règlements cités

Code criminel, L.R.C. (1985), ch. C-46, art. 487(1)*b*) [mod. ch. 27 (1er suppl.), art. 68; mod. 1994, ch. 44, art. 36].
Loi d'interprétation, L.R.C. (1985), ch. I-21, art. 12.
Loi sur les pêches, L.R.C. (1985), ch. F-14, art. 36(3), 40(2).
Waste Management Act, S.B.C. 1982, ch. 41, art. 3(1.1) [aj. 1985, ch. 52, art. 96], 34(3).

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1997), 145 D.L.R. (4th) 427, 90 B.C.A.C. 126, 147 W.A.C. 126, 114 C.C.C. (3d) 537, [1997] B.C.J. No. 724 (QL), qui a confirmé une décision rendue par la Cour suprême de la Colombie-Britannique (1996), 138 D.L.R. (4th) 104, 108 C.C.C. (3d) 497, [1996] B.C.J. No. 1482 (QL), annulant certains mandats de perquisition. Pourvoi accueilli.

S. David Frankel, *Q.C.*, and *Kenneth Yule*, for the appellant.

Gary A. Letcher, *Jonathan S. McLean* and *Eric B. Miller*, for the respondents.

Michal Fairburn, for the intervener

The judgment of the Court was delivered by

1 MAJOR J. — This appeal raises the question of whether search warrants issued under s. 487(1)(*b*) of the *Criminal Code*, R.S.C., 1985, c. C-46, authorize investigators to search for and seize evidence of negligence in the investigation of strict liability offences. At the conclusion of argument the question was answered in the affirmative and the appeal was allowed with reasons to follow.

I. Facts

2 On October 13, 1994 a chlor-alkali plant operated by the respondents (collectively referred to as "CanadianOxy") in North Vancouver, British Columbia discharged a quantity of chlorine into the waters of Burrard Inlet, killing a number of fish. This incident occurred during a three and a half hour power outage at the plant, as a result of one of two B.C. Hydro 60 kV power lines servicing the plant being struck by a tree.

3 The company reported the discharge to the authorities and an investigation by the Department of Fisheries and Oceans followed. Fishery Officer Robert Tompkins went to the plant that night, spoke with the Plant Chemist, and seized a number of documents. He also seized samples of dead fish recovered in the vicinity of the plant by the Harbour Master's patrol vessel. He advised the Plant Manager that he had reasonable grounds to believe that an offence had been committed under the *Fisheries Act*, R.S.C., 1985, c. F-14.

S. David Frankel, *c.r.*, et *Kenneth Yule*, pour l'appelant.

Gary A. Letcher, *Jonathan S. McLean* et *Eric B. Miller*, pour les intimées.

Michal Fairburn, pour l'intervenant.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR — Le présent pourvoi soulève la question de savoir si les mandats de perquisition décernés en vertu de l'al. 487(1)*b*) du *Code criminel*, L.R.C. (1985), ch. C-46, autorisent les enquêteurs à rechercher en vue de les saisir des preuves de négligence dans le cadre d'une enquête sur des infractions de responsabilité stricte. À la clôture des débats, il a été répondu à cette question par l'affirmative et le pourvoi a été accueilli, avec motifs à suivre.

I. Les faits

Le 13 octobre 1994, une usine de fabrication de chlore et de soude caustique exploitée par les intimées (collectivement appelées «CanadianOxy») à North Vancouver (Colombie-Britannique) a rejeté du chlore dans les eaux du bras de mer Burrard, ce qui a provoqué la mort de nombreux poissons. L'incident s'est produit pendant une panne d'électricité de trois heures et demie à l'usine, causée par un arbre qui a heurté l'une des deux lignes d'alimentation en électricité de 60 kV de B.C. Hydro desservant l'usine.

L'entreprise a signalé le rejet aux autorités et une enquête a été ouverte par le ministère des Pêches et des Océans. S'étant rendu à l'usine le soir même, l'agent des pêches Robert Tompkins a parlé avec le chimiste de l'usine et il a saisi un certain nombre de documents. Il a également saisi des échantillons de poissons morts que le patrouilleur du directeur de port avait trouvés à proximité de l'usine. Il a informé le directeur de l'usine qu'il avait des motifs raisonnables de croire qu'une infraction à la *Loi sur les pêches*, L.R.C. (1985), ch. F-14, avait été commise.

Over a short time Tompkins made three further visits to the plant, formally interviewed the Plant Chemist, was shown the valve which the company had identified as the cause of the discharge and was provided with certain documents. His request to interview additional employees was refused.

Tompkins subsequently made a written request to CanadianOxy's counsel for additional technical information believed relevant for Environment Canada's Pollution Abatement Division to assess whether the discharge had been preventable. Only a few of these questions were answered.

On March 16, 1995, five months after the discharge, Tompkins swore an information and obtained a warrant to search the respondents' plant for a range of documents relating to process records, plant maintenance, employee training, discipline, and general plant operations. In the information, Tompkins described the reasons for seeking this information:

> The business records . . . are required to establish and prove that CanadianOxy Chemicals Ltd. . . . operate a chlor-alkali plant that discharges effluent to the waters of Burrard Inlet near North Vancouver, B.C., that the release of effluent with a chlorine concentration exceeding 10 ppm, which I know would be acutely lethal to fish, occurred on October 13, 1994, and that the company could have taken additional reasonable measures to prevent the release of a deleterious substance into water frequented by fish . . . .
>
> . . . I have reasonable grounds to believe that correspondence had been generated by company personnel in January 1994, and that maintenance was performed in March 1994, and again in October 1994, and that the company conducted their own investigation, prepared reports, and provided information regarding the incident until February 1995. . . .
>
> It is necessary to examine effluent discharge records, effluent water quality sampling and analysis records, mechanical and instrument maintenance records, environmental control records, instrument calibration records and flow rate calculation records covering an extended period of time before and after October 13,

Sur une courte période, Tompkins s'est rendu à l'usine à trois autres reprises. Il a interrogé officiellement le chimiste de l'usine, il s'est fait montrer la valve que l'entreprise considérait comme la cause du rejet, et il s'est fait remettre certains documents. Il a demandé à rencontrer d'autres employés, ce qui lui a été refusé. 4

Tompkins a par la suite demandé par écrit à l'avocat de CanadianOxy d'autres renseignements techniques jugés utiles par la Direction de la dépollution d'Environnement Canada pour évaluer si le rejet aurait pu être évité. Seulement quelques questions ont fait l'objet d'une réponse. 5

Le 16 mars 1995, cinq mois après le rejet, Tompkins a fait une dénonciation sous serment et a obtenu un mandat pour faire une perquisition à l'usine des intimées afin d'y rechercher différents documents concernant les dossiers de fabrication, l'entretien de l'usine, la formation des employés, la discipline et les opérations générales de l'usine. Dans la dénonciation, Tompkins exposait les motifs de sa recherche de renseignements: 6

> [TRADUCTION] Les dossiers de l'entreprise [. . .] sont nécessaires pour prouver que CanadianOxy Chemicals Ltd. [. . .] exploite une usine de fabrication de chlore et de soude caustique qui rejette des effluents dans les eaux du bras de mer Burrard près de North Vancouver (C.-B.), qu'un rejet d'effluents ayant une concentration de chlore supérieure à 10 ppm, que je sais être extrêmement mortelle pour les poissons, s'est produit le 13 octobre 1994 et que l'entreprise aurait pu prendre des mesures raisonnables supplémentaires pour empêcher le rejet d'une substance nocive dans des eaux où vivent des poissons . . .
>
> . . . J'ai des motifs raisonnables de croire que des lettres ont été envoyées par des employés de l'entreprise en janvier 1994 et que des travaux d'entretien ont été effectués en mars 1994, et à nouveau en octobre 1994, et que l'entreprise a mené sa propre enquête, a rédigé des rapports et a fourni des renseignements concernant l'incident jusqu'en février 1995 . . .
>
> Il est nécessaire d'examiner les registres de rejet d'effluents, les registres d'échantillonnage et d'analyse de la qualité des effluents, les registres d'entretien des instruments et d'entretien mécanique, les registres de contrôle de l'environnement, les registres de calibrage des instruments et les registres de calcul du débit sur une période

1994. This will . . . permit analysis of the maintenance programs undertaken by CanadianOxy Chemicals Ltd.

It is necessary to examine company personnel records covering the period between January 1, 1994 and February 28, 1995 . . . to determine if any company employees have been disciplined in any manner as a result of this incident. . . .

7 The warrant was executed on March 17, 1995. In total 139 items were seized pursuant to the warrant, and 73 additional items were seized under the investigators' understanding of the "plain view" doctrine. Following the search, Tompkins learned by coincidence of an adverse ruling by a British Columbia Provincial Court judge on the validity of a similar seizure in an unrelated case. As a result, he sought legal advice with respect to a number of the items taken.

8 On April 26, 1995, Tompkins made two applications to a Justice of the Peace, one for an order to return the documents which had been improperly seized under the first warrant, and the second for a new warrant to re-seize 13 of the items returned which were relevant to the investigation. These orders were granted and executed the same day.

9 On June 15, 1995 the respondents were charged with:

(a) depositing, or permitting the deposit, of a deleterious substance in waters frequented by fish, contrary to ss. 36(3) and 40(2) of the *Fisheries Act*; and

(b) introducing, or causing or allowing the introduction of waste into the environment, contrary to ss. 3(1.1) and 34(3) of the *Waste Management Act*, S.B.C. 1982, c. 41 (now R.S.B.C. 1996, c. 482).

10 The respondents subsequently brought a motion to quash the warrants alleging that s. 487(1) of the *Criminal Code* had been exceeded. The warrants

prolongée avant et après le 13 octobre 1994. Cet examen [. . .] permettra d'analyser les programmes d'entretien de CanadianOxy Chemicals Ltd.

Il est nécessaire d'examiner les dossiers du personnel de l'entreprise concernant la période allant du 1er janvier 1994 au 28 février 1995 [. . .] pour décider si des employés de l'entreprise ont fait l'objet de mesures disciplinaires à la suite de cet incident. . . .

Le mandat a été exécuté le 17 mars 1995. Au total, les enquêteurs ont saisi 139 pièces en application du mandat et 73 autres en s'appuyant sur leur interprétation de la théorie des «objets bien en vue». Après la perquisition, Tompkins a appris par hasard qu'un juge de la Cour provinciale de la Colombie-Britannique avait déclaré invalide une saisie similaire dans une autre affaire. Il a donc consulté un avocat relativement à un certain nombre des pièces saisies.

Le 26 avril 1995, Tompkins a présenté deux demandes à un juge de paix, l'une en vue d'obtenir une ordonnance enjoignant de remettre les documents qui avaient été saisis irrégulièrement en vertu du premier mandat et l'autre en vue d'obtenir un nouveau mandat pour saisir à nouveau 13 des pièces remises qui étaient pertinentes relativement à l'enquête. Ces ordonnances ont été prononcées et exécutées le même jour.

Le 15 juin 1995, les intimées ont été accusées:

a) d'avoir immergé ou rejeté une substance nocive — ou d'en avoir permis l'immersion ou le rejet — dans des eaux où vivent des poissons, en contravention des par. 36(3) et 40(2) de la *Loi sur les pêches*;

b) d'avoir introduit des déchets dans l'environnement — ou d'en avoir causé ou permis l'introduction —, en contravention des par. 3(1.1) et 34(3) de la *Waste Management Act*, S.B.C. 1982, ch. 41 (maintenant R.S.B.C. 1996, ch. 482).

Les intimées ont par la suite présenté une requête en annulation des mandats en faisant valoir que les limites du par. 487(1) du *Code criminel*

were broad enough to authorize a search for evidence of negligence which if found would negate a defence of due diligence.

II. Judicial History

A. *British Columbia Supreme Court* (1996), 138 D.L.R. (4th) 104

Sigurdson J. felt bound by *Re Domtar Inc.* (1995), 18 C.E.L.R. (N.S.) 106 (B.C.S.C.), which held that a s. 487 warrant could not be used to search for and seize evidence of negligence going to the defence of due diligence. As a result, he ruled that the documents seized pertaining to the issue of due diligence were not documents with respect to the commission of this particular offence and quashed both warrants.

B. *British Columbia Court of Appeal* (1997), 145 D.L.R. (4th) 427

In dismissing the appeal, Goldie J.A. (Carrothers J.A. concurring) held that the appellant had failed to demonstrate on any reasonable construction that s. 487(1)(*b*) authorizes the issuance of a warrant that includes a search for evidence with respect to due diligence in a regulatory offence. In dissent, Southin J.A. concluded that a warrant can issue upon proper evidence to search for and seize things relating to the question of due diligence.

III. Analysis

At issue is whether search warrants issued pursuant to s. 487(1) of the *Criminal Code* are limited only to evidence relevant to an element of the offence which is part of the Crown's *prima facie* case, or whether such warrants encompass evidence that may relate to potential defences, such as due diligence, which may or may not be raised at

avaient été outrepassées. La portée des mandats était assez large pour autoriser une perquisition pour rechercher des preuves de négligence qui, si elles étaient trouvées, feraient échouer une défense fondée sur la diligence raisonnable.

II. L'historique judiciaire

A. *La Cour suprême de la Colombie-Britannique* (1996), 138 D.L.R. (4th) 104

11 Le juge Sigurdson a estimé qu'il était lié par l'arrêt *Re Domtar Inc.* (1995), 18 C.E.L.R. (N.S.) 106 (C.S.C.-B.), statuant qu'un mandat décerné en vertu de l'art. 487 ne pouvait pas être utilisé pour effectuer une perquisition en vue de saisir des preuves de négligence se rapportant à la défense fondée sur la diligence raisonnable. Il a donc statué que les documents saisis relativement à la question de la diligence raisonnable n'étaient pas des documents touchant la commission de l'infraction reprochée, et il a annulé les deux mandats.

B. *Cour d'appel de la Colombie-Britannique* (1997), 145 D.L.R. (4th) 427

12 Pour rejeter l'appel, le juge Goldie de la Cour d'appel (avec l'appui du juge Carrothers) a statué que l'appelant n'avait pas établi, selon une interprétation raisonnable, que l'al. 487(1)*b*) autorisait la délivrance d'un mandat permettant notamment d'effectuer une perquisition pour rechercher des éléments de preuve touchant la diligence raisonnable dans le contexte d'une infraction réglementaire. Dans ses motifs dissidents, le juge Southin a conclu qu'un mandat pouvait, sur la foi d'éléments de preuve suffisants, être décerné pour effectuer une perquisition et saisir des choses se rapportant à la question de la diligence raisonnable.

III. Analyse

13 La question litigieuse est de savoir si les mandats de perquisition décernés en vertu du par. 487(1) du *Code criminel* se limitent uniquement à la preuve se rapportant à un élément de l'infraction faisant partie de la preuve *prima facie* du ministère public, ou s'ils visent la preuve pouvant se rapporter à des moyens de défense

the trial. The relevant section of the *Code* provides:

487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

. . .

(*b*) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,

. . .

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer

(*d*) to search the building, receptacle or place for any such thing and to seize it . . . [Emphasis added.]

14 Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-22. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids. In our opinion there is no such ambiguity in s. 487(1).

A. *The Ordinary Meaning of the Words*

15 On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their

possibles, telle la diligence raisonnable, qui peuvent être invoqués au procès ou non. La disposition pertinente du *Code* est ainsi conçue:

487. (1) Un juge de paix qui est convaincu, à la suite d'une dénonciation faite sous serment selon la formule 1, qu'il existe des motifs raisonnables de croire que, dans un bâtiment, contenant ou lieu, se trouve, selon le cas:

. . .

b) une chose dont on a des motifs raisonnables de croire qu'elle fournira une preuve touchant la commission d'une infraction ou révélera l'endroit où se trouve la personne qui est présumée avoir commis une infraction à la présente loi, ou à toute autre loi fédérale;

. . .

peut à tout moment décerner un mandat sous son seing, autorisant une personne qui y est nommée ou un agent de la paix:

d) d'une part, à faire une perquisition dans ce bâtiment, contenant ou lieu, pour rechercher cette chose et la saisir;

Les dispositions législatives doivent être interprétées de manière à donner aux mots leur sens ordinaire le plus évident qui s'harmonise avec le contexte et l'objet visé par la loi dans laquelle ils sont employés; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 21 et 22. C'est uniquement lorsque deux ou plusieurs interprétations plausibles, qui s'harmonisent chacune également avec l'intention du législateur, créent une ambiguïté véritable que les tribunaux doivent recourir à des moyens d'interprétation externes. Selon nous, le par. 487(1) ne contient pas semblable ambiguïté.

A. *Le sens ordinaire des mots*

D'après son sens ordinaire, l'expression «preuve touchant la commission d'une infraction» est compréhensive et englobe tous les éléments qui pourraient jeter la lumière sur les circonstances d'un événement qui paraît constituer une infraction. Selon le sens naturel et ordinaire de cette expression, est visé par le mandat tout ce qui a trait ou se rapporte logiquement à l'incident faisant

potential culpability falls within the scope of the warrant.

This reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

We can assume that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's *prima facie* case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants.

The respondents urged that s. 487(1) be given a restrictive reading in accordance with the principle that an ambiguous penal statute should be interpreted in a manner most favourable to an accused: see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 39. That argument was rejected as, in our opinion, this section is neither ambiguous, nor the type of penal provisions to which the rule should apply. Instead, s. 487 should be given a liberal and purposive interpretation; *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12.

While s. 487(1) is part of the *Criminal Code*, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that all relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the *Criminal Code* and the

l'objet de l'enquête, aux parties en cause et à leur culpabilité éventuelle.

16 Cette interprétation s'appuie sur le sens donné par le juge Dickson à une expression pratiquement identique dans l'arrêt *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, à la p. 39:

> À mon avis, les mots «quant à» ont la portée la plus large possible. Ils signifient, entre autres, «concernant», «relativement à» ou «par rapport à». Parmi toutes les expressions qui servent à exprimer un lien quelconque entre deux sujets connexes, c'est probablement l'expression «quant à» qui est la plus large. [Je souligne.]

17 Nous pouvons présumer que le législateur a décidé de ne pas limiter le par. 487(1) à la preuve établissant un élément faisant partie de la preuve *prima facie* du ministère public. Parvenir à une autre conclusion reviendrait en réalité à retrancher le mot «touchant» de la disposition. Même amputé de ce mot, le par. 487(1) est suffisamment large pour autoriser la perquisition dont il est question, mais son insertion dans la disposition appuie manifestement la validité de ces mandats.

18 Les intimées soutiennent avec insistance que le par. 487(1) doit recevoir une interprétation restrictive conformément au principe voulant qu'une disposition pénale ambiguë soit interprétée de la façon qui favorisera le plus l'accusé: voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, au par. 39. Nous avons rejeté cet argument parce que, selon nous, cette disposition n'est pas ambiguë et qu'il ne s'agit pas du type de dispositions pénales auquel ce principe doit s'appliquer. Il convient plutôt de donner à l'art. 487 une interprétation large et fondée sur l'objet visé; *Loi d'interprétation*, L.R.C. (1985), ch. I-21, art. 12.

19 Bien que le par. 487(1) fasse partie du *Code criminel* et puisse occasionner des atteintes importantes à la vie privée, l'intérêt public commande qu'une enquête prompte et approfondie soit menée s'il y a possibilité d'infraction. C'est par rapport à cet intérêt que tous les renseignements et éléments de preuve pertinents doivent être trouvés et conservés le plus rapidement possible. Cette interpré-

demands of a fair and expeditious administration of justice.

B. *Purpose of the Search Warrant Provisions of the Criminal Code*

20 A primary, though not exclusive, purpose of the *Criminal Code*, and penal statutes in general, is to promote a safe, peaceful and honest society. This is achieved by providing guidelines prohibiting unacceptable conduct, and providing for the just prosecution and punishment of those who transgress these norms. The prompt and comprehensive investigation of potential offences is essential to fulfilling that purpose. The point of the investigative phase is to gather all the relevant evidence in order to allow a responsible and informed decision to be made as to whether charges should be laid.

21 At the investigative stage the authorities are charged with determining the following: What happened? Who did it? Is the conduct criminally culpable behaviour? Search warrants are a staple investigative tool for answering those questions, and the section authorizing their issuance must be interpreted in that light.

22 The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out — that decision is the role of the courts. The function of the police, and other peace officers, is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities. To that end an unnecessary and restrictive interpretation of s. 487(1) defeats its purpose. See *Re Church of Scientology*

tation est compatible avec les objets qui sous-tendent le *Code criminel* et les exigences d'une administration de la justice prompte et équitable.

B. *Objet des dispositions relatives au mandat de perquisition du Code criminel*

Le *Code criminel*, et les dispositions pénales en général, visent principalement, mais non exclusivement, à favoriser une société pacifique et intègre qui soit sûre. En vue de réaliser cet objectif, des lignes directrices interdisent les agissements inacceptables et prescrivent la poursuite et le châtiment justes de ceux qui transgressent ces normes. S'il y a possibilité d'infraction, une enquête prompte et approfondie est essentielle pour atteindre ce but. L'enquête vise à rassembler tous les éléments de preuve pertinents de manière à permettre une prise de décision judicieuse et éclairée sur l'opportunité de porter des accusations.

Au stade de l'enquête, il incombe aux autorités de trancher les points suivants: Que s'est-il passé? Qui est responsable? La conduite reprochée est-elle un comportement susceptible d'engager la responsabilité criminelle? Le mandat de perquisition est un instrument d'enquête de base qui permet de répondre à ces questions, et la disposition qui en autorise la délivrance doit être interprétée sous cet angle.

Le paragraphe 487(1) vise à permettre aux enquêteurs de découvrir et de conserver le plus d'éléments de preuve pertinents possible. Pour être en mesure d'exercer convenablement les fonctions qui leur ont été confiées, les autorités doivent pouvoir découvrir, examiner et conserver tous les éléments de preuve se rapportant à des événements susceptibles de donner lieu à une responsabilité criminelle. Il n'appartient pas aux policiers de mener une enquête pour décider si les éléments essentiels d'une infraction sont établis — cette décision relève des tribunaux. Le rôle des policiers et autres agents de la paix consiste à enquêter sur des incidents qui pourraient être criminels, à prendre une décision consciencieuse et éclairée sur l'opportunité de porter des accusations, puis à soumettre l'ensemble des faits sans les dénaturer aux autorités chargées des poursuites. À cette fin, une

and the Queen (No. 6) (1987), 31 C.C.C. (3d) 449, at p. 475:

> Police work should not be frustrated by the meticulous examination of facts and law that is appropriate to a trial process. . . . There may be serious questions of law as to whether what is asserted amounts to a criminal offence. . . . However, these issues can hardly be determined before the Crown has marshalled its evidence and is in a position to proceed with the prosecution.

Moreover, extrinsic factors such as the accused's motive or the failure to exercise due diligence are often relevant to determining whether the event which triggered the investigation in the first place is criminally culpable. Everyone, including accused persons, who lacks the means of obtaining and preserving evidence prior to trial has an interest in seeing that these facts are brought to light. It would be undesirable if a narrow reading of s. 487(1) resulted in either inculpatory or exculpatory evidence being lost because of the investigators' inability to secure it. See *R. v. Storrey*, [1990] 1 S.C.R. 241, *per* Cory J., at p. 254:

> The essential role of the police is to investigate crimes. That role and function can and should continue after they have made a lawful arrest. The continued investigation will benefit society as a whole and not infrequently the arrested person. It is in the interest of the innocent arrested person that the investigation continue so that he or she may be cleared of the charges as quickly as possible.

It is important that an investigation unearth as much evidence as possible. It is antithetical to our system of justice to proceed on the basis that the police, and other authorities, should only search for evidence which incriminates their chosen suspect. Such prosecutorial "tunnel vision" would not be appropriate: see *The Commission on Proceedings Involving Guy Paul Morin*: *Report*, vol. 1 (1998), *per* the Honourable F. Kaufman at pp. 479-82.

interprétation du par. 487(1) qui est restrictive et qui ne s'impose pas va à l'encontre du but recherché. Voir *Re Church of Scientology and the Queen (No. 6)* (1987), 31 C.C.C. (3d) 449, à la p. 475:

> [TRADUCTION] Le travail des policiers ne devrait pas être gêné par l'examen minutieux des faits et du droit, exercice qui est pertinent dans le cadre d'un procès [. . .] La question de savoir si les faits déclarés constituent une infraction criminelle peut soulever d'importantes questions de droit [. . .] Toutefois, ces questions ne peuvent guère être tranchées tant que le ministère public n'a pas rassemblé ses éléments de preuve et qu'il n'est pas en mesure d'engager des poursuites.

23 De plus, des facteurs extrinsèques tel le mobile de l'accusé ou le défaut de faire preuve de diligence raisonnable sont souvent pertinents quant à la question de savoir si l'événement qui a déclenché l'enquête en premier lieu est de nature à engager la responsabilité criminelle. Toute personne, y compris le prévenu, qui est privée des moyens de recueillir et de conserver des éléments de preuve avant un procès a intérêt à ce que ces faits soient connus. Il ne serait pas souhaitable qu'une interprétation étroite du par. 487(1) entraîne la perte d'éléments de preuve inculpatoires ou disculpatoires parce que les enquêteurs ne peuvent les obtenir. Voir *R. c. Storrey*, [1990] 1 R.C.S. 241, motifs du juge Cory, à la p. 254:

> Le rôle de la police consiste essentiellement à faire enquête sur les crimes. C'est là une fonction qu'elle peut et devrait continuer à exercer après avoir effectué une arrestation légale. La continuation de l'enquête profitera à la société dans son ensemble et souvent aussi à la personne arrêtée. En effet, il est dans l'intérêt de la personne innocente arrêtée que l'enquête se poursuive afin que son innocence à l'égard des accusations puisse être établie dans les plus brefs délais.

24 Il est important que les enquêteurs découvrent le plus d'éléments de preuve possible. Admettre que les policiers, et d'autres autorités, ne doivent rechercher que les seuls éléments de preuve qui incriminent le suspect visé est incompatible avec notre système de justice. Un tel «manque d'objectivité» de la part du poursuivant serait inapproprié: voir *Commission sur les poursuites contre Guy Paul Morin: Rapport*, t. 1 (1998), le commissaire F. Kaufman, aux pp. 559 à 562.

25 In *Nelles v. Ontario*, [1989] 2 S.C.R. 170, Lamer J. (later C.J.C.) stated for the majority, at pp. 191-92, that:

> Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate". (Morris Manning, "Abuse of Power by Crown Attorneys", [1979] *L.S.U.C. Lectures* 571, at p. 580, quoting Henry Bull, Q.C.) As regards the proper role of the Crown Attorney, perhaps no more often quoted statement is that of Rand J. in *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24:
>
> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

Dans l'arrêt *Nelles c. Ontario*, [1989] 2 R.C.S. 170, le juge Lamer (maintenant Juge en chef) a déclaré au nom des juges majoritaires aux pp. 191 et 192:

> Le procureur de la Couronne a traditionnellement été décrit comme un [TRADUCTION] «représentant de la justice» qui «devrait se considérer plus comme un fonctionnaire de la cour que comme un avocat». (Morris Manning, «Abuse of Power by Crown Attorneys», [1979] *L.S.U.C. Lectures* 571, à la p. 580, citant Henry Bull, c.r.) Sur le rôle qui est propre au procureur de la Couronne, il n'y a probablement aucun passage qui soit aussi souvent cité que cet extrait des motifs du juge Rand dans l'affaire *Boucher v. The Queen*, [1955] R.C.S. 16, aux pp. 23 et 24:
>
> > [TRADUCTION] On ne saurait trop répéter que les poursuites criminelles n'ont pas pour but d'obtenir une condamnation, mais de présenter au jury ce que la Couronne considère comme une preuve digne de foi relativement à ce que l'on allègue être un crime. Les avocats sont tenus de voir à ce que tous les éléments de preuve légaux disponibles soient présentés: ils doivent le faire avec fermeté et en insistant sur la valeur légitime de cette preuve, mais ils doivent également le faire d'une façon juste. Le rôle du poursuivant exclut toute notion de gain ou de perte de cause; il s'acquitte d'un devoir public, et dans la vie civile, aucun autre rôle ne comporte une plus grande responsabilité personnelle.

26 The majority of the British Columbia Court of Appeal found that the word "commission" in s. 487(1) restricted its application to evidence that the accused had done those acts, or allowed those omissions, which constitute the elements of the offence. The criminal justice system is not solely concerned with whether a *prima facie* case can be made out against an accused, but whether he or she is ultimately guilty. The dissenting reasons of Southin J.A. are persuasive on both the purpose and meaning of s. 487(1). At para. 63 she stated:

> . . . I would translate the words in issue to mean "touching upon whether a breach of the law involving a penal sanction has occurred". Whether or not there can be said to have been such a breach depends upon whether there

Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont conclu que l'emploi du mot «commission» au par. 487(1) limitait son application aux éléments de preuve établissant que l'accusé avait commis les actes ou avait permis les omissions qui constituent les éléments de l'infraction. Le système de justice pénale ne se préoccupe pas uniquement de la question de savoir si une preuve *prima facie* peut être établie contre un accusé, il s'intéresse aussi à la question de savoir si l'accusé est coupable en définitive. Les motifs dissidents du juge Southin sont convaincants en ce qui concerne tant l'objet que le sens du par. 487(1). Au paragraphe 63, elle dit:

> [TRADUCTION] . . . je dirais que les mots en cause veulent dire «touchant la question de savoir si une violation de la loi entraînant une sanction pénale a été commise». La question de savoir si l'on peut affirmer ou non qu'une

can be a penal sanction and there can be no sanction without a conviction.

In addition, as pointed out by the intervener Attorney General for Ontario, denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system. In order to be fair, the criminal process must "enable the trier of fact to 'get at the truth and properly and fairly dispose of the case' while at the same time providing the accused with the opportunity to make a full defence"; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 486. This reciprocal fairness demands that the Crown be able to fairly seek and obtain evidence rebutting the accused's defences. If the respondents' submission on the interpretation of s. 487(1) were accepted, a search warrant would never be available for this purpose. This narrow interpretation would frustrate the basic imperative of trial fairness and the search for truth in the criminal process.

C. *Privacy Concerns*

There is no doubt that search warrants are highly intrusive, and that an investigation bearing on the issue of due diligence could, as Shaw J. pointed out in *Re Domtar*, *supra*, at p. 119, "entail a detailed inquiry into the affairs of a corporation over a period of several years". This Court has endorsed the importance of privacy and the need to constrain search powers within reasonable limits: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 889; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 520-22; *Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 436-37.

The broad powers contained in s. 487(1) do not authorize investigative fishing expeditions, nor do

telle violation a été commise dépend de la question de savoir s'il peut y avoir une sanction pénale, et il ne saurait y avoir de sanction sans déclaration de culpabilité.

27 De plus, comme l'a souligné l'intervenant, le procureur général de l'Ontario, refuser d'admettre que le ministère public peut rassembler des éléments de preuve en prévision de la présentation d'un moyen de défense aurait des conséquences graves sur le fonctionnement de notre système de justice. Pour être équitable, le processus pénal doit «permettre au juge des faits "de découvrir la vérité et de rendre une décision équitable" tout en accordant à l'accusé la possibilité de présenter une pleine défense»; *R. c. Levogiannis*, [1993] 4 R.C.S. 475, à la p. 486. Cette équité réciproque commande que le ministère public soit en mesure de rechercher et d'obtenir régulièrement des éléments de preuve pour réfuter les moyens de défense invoqués par l'accusé. Si la thèse des intimées concernant l'interprétation du par. 487(1) était acceptée, il serait impossible d'obtenir un mandat de perquisition à cette fin. Cette interprétation étroite ferait échec à l'impératif fondamental de l'équité du procès et à la recherche de la vérité dans le processus pénal.

C. *Questions touchant le droit à la vie privée*

28 Il est certain que le mandat de perquisition est très envahissant, et une enquête portant sur la question de la diligence raisonnable pourrait, ainsi que le juge Shaw l'a fait remarquer dans l'arrêt *Re Domtar*, précité, à la p. 119, [TRADUCTION] «comporter un examen approfondi des affaires d'une société sur une période de plusieurs années». Notre Cour a reconnu l'importance du droit à la vie privée et la nécessité de restreindre les pouvoirs de perquisition dans des limites raisonnables: *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, à la p. 889; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, aux pp. 520 à 522; *Baron c. Canada*, [1993] 1 R.C.S. 416, aux pp. 436 et 437.

29 Les pouvoirs étendus qui sont visés au par. 487(1) n'autorisent pas les recherches à

they diminish the proper privacy interests of individuals or corporations. This is particularly true with respect to personnel records which may contain a great deal of highly personal information unrelated to the investigation at hand. Judges and magistrates should continue to apply the standards and safeguards which protect privacy from unjustified searches and seizures.

30 In this case, however, the specific terms of the warrant were not at issue, as the respondents challenged only the underlying authority to grant warrants for the purpose of investigating the presence of negligence. In our opinion both a plain reading of the relevant section and consideration of the role and obligations of state investigators support the conclusion that s. 487(1) authorized the granting of the warrants at issue.

IV. Disposition

31 The appeal is allowed, without costs, as agreed by counsel.

Appeal allowed.

Solicitor for the appellant: The Attorney General of Canada, Vancouver.

Solicitors for the respondents: Edwards, Kenny & Bray, Vancouver.

Solicitor for the intervener: The Attorney General for Ontario, Toronto.

l'aveuglette dans le cadre d'une enquête et ne diminuent pas le droit légitime à la vie privée des personnes physiques ou morales. C'est particulièrement vrai dans le cas des dossiers des employés, qui peuvent contenir une foule de renseignements très personnels n'ayant aucun rapport avec l'enquête qui est menée. Les juges et les magistrats doivent continuer d'appliquer les normes et garanties qui protègent la vie privée contre les perquisitions, les fouilles et les saisies abusives.

En l'espèce, toutefois, les modalités précises du mandat n'étaient pas en jeu, puisque les intimées ont uniquement contesté le pouvoir fondamental de décerner des mandats en vue de faire enquête sur l'existence d'une négligence. À notre avis, le sens ordinaire de la disposition pertinente et la prise en compte du rôle et des obligations des enquêteurs de l'État appuient la conclusion que le par. 487(1) autorisait la délivrance des mandats litigieux en l'espèce.

IV. Dispositif

Le pourvoi est accueilli sans dépens, ainsi que les avocats en ont convenu.

Pourvoi accueilli.

Procureur de l'appelant: Le procureur général du Canada, Vancouver.

Procureurs des intimées: Edwards, Kenny & Bray, Vancouver.

Procureur de l'intervenant: Le procureur général de l'Ontario, Toronto.

TAB 3

CITATION: Chesterman Farm Equipment Inc. v. CNH Canada Ltd., 2016 ONSC 698
DIVISIONAL COURT FILE NO.: 14-0033-00
DATE: 20160307

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MOLLOY, HACKLAND and HAMBLY JJ.

BETWEEN:	)	
	)	
CHESTERMAN FARM EQUIPMENT INC.	)	*Eric Gillespie, John May and Ian Flett*, for the Applicant/Respondent on Appeal
	)	
Applicant /Respondent on Appeal)	)	
	)	
– and –	)	
	)	*Stuart R. MacKay*, for the Respondent/Appellant
CNH CANADA LTD.	)	
	)	
Respondent/Appellant	)	
	)	
	)	
	)	**HEARD:** October 20, 2015 in Brampton, and in writing in November, 2015

REASONS FOR JUDGMENT

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HAMBLY J. AND HACKLAND J.:

Overview

[1] Our colleague Justice Molloy has set out a comprehensive summary of the history of this proceeding and of the legal and factual issues arising in this appeal. For that reason, we will only refer to the matters necessary to explain our decision, which is based on the jurisdictional limitations of this Court in dealing with this appeal. We agree with Justice Molloy and indeed with the Agriculture, Food and Rural Affairs Appeals Tribunal ("the Tribunal"), that Ontario Regulation 123/06 made under the Farm Implements Act, R.S.O. 1990, c F4 ("the Act") came into force on April 25, 2006, with retrospective effect, so as to apply to the Dealer Agreement between the parties Chesterman Farm Equipment Inc. ("Chesterman") a farm equipment dealer and CNH Canada Ltd. ("CNH"), a manufacturer and distributor of farm equipment.

[2] The Tribunal, after a lengthy hearing in which extensive evidence was called, held that CNH had improperly terminated the Dealer Agreement between the parties and awarded damages to Chesterman in the sum of $60,000 for lost profit, $80,000 for obsolete assets and

$60,000 in pre-judgment interest. Costs were also awarded to Chesterman in the amount of $376,338.05. CNH appeals that decision and Chesterman cross-appeals for an increase in the damages awarded.

Analysis

[3] Pursuant to s. 5(7)-(9) of the Act an appeal lies to this court, but solely on a question of law. This important jurisdictional limitation must be respected. It means that this court is precluded from reviewing the reasoning and findings of facts of the Tribunal to the extent that the matters in issue are either purely factual or are mixed questions of fact and law. In this case, CNH refused to renew its Dealer Agreement with Chesterman upon its expiry on December 31, 2006. The Tribunal had the statutory mandate under Regulation 123/06 to inquire into and determine whether the distributor's (CNH) approval for renewal was "unreasonably withheld". The Tribunal analyzed the Dealer Agreement and the relevant dealings between the parties and concluded CNH had unreasonably withheld its approval to renew. That decision was within the Tribunal's specific mandate and the considerations were fact and credibility based for the most part. Accordingly, we are of the opinion that this Court lacks the jurisdiction to hear an appeal from the Tribunal's finding as to the reasonableness of CNH's decision.

[4] It is common ground that for the purposes of Regulation 123/06, Chesterman is a "dealer" and CNH is a "distributor". This regulation imposed mandatory terms into dealer agreements. The Regulation provides:

> Mandatory terms
>
> 1. (1) The terms set out in sections 2 and 3 are prescribed as the mandatory terms that must be included in any dealership agreement under subsection 3(4) of the Act.
>
> (2) The mandatory terms set out in sections 2 and 3 are deemed to form part of any dealership agreement even if the agreement fails to include them as required.
>
> (3) A provision in a dealership agreement that limits, varies or attempts to waive a term set out in sections 2 and 3 is void.

[5] For purposes of this appeal, the relevant terms imposed by the Regulation, under s. 3 provide:

> 3. (1) The dealer has the right, and the agreement shall not be interpreted as interfering with the right of the dealer to,
>
> b) renew or transfer the dealership agreement;
>
> (3) A dealer who wishes to renew or transfer a dealership agreement under clause (1)(b) shall notify the distributor in writing of that fact.

> (4) A renewal or transfer of a dealership agreement under clause (1)(b) is subject to the approval of the distributor, which approval shall not be unreasonably withheld.
>
> (6) If the distributor intends to refuse the transfer or renewal of the dealership agreement, the following rules apply:
>
> 1. The distributor shall notify the dealer in writing of the reasons for the refusal, within 45 days of receiving the request for approval.
>
> 2. If the distributor fails to notify the dealer within the 45-day period, the transfer or renewal is deemed to be approved.
>
> 3. The dealer shall be allowed 15 days from receipt of the notice to address the concerns underlying the refusal.
>
> 4. After the 15-day period has passed, the distributor may, subject to subsection (3), refuse the transfer or renewal.
>
> (7) The distributor has the right to set sales targets that are fair and reasonable.
>
> (emphasis added)

[6] As noted, we agree with Justice Molloy's analysis and her conclusion that the Tribunal was correct in holding that this regulation applied retrospectively to this Dealer Agreement and others throughout the province. The retrospectivity issue is a pure question of law involving issues of statutory interpretation and is not dependent on the factual matrix between the parties in this case.

[7] However, having found that Regulation 123/06 applied to the Dealer Agreement between the parties, it was necessary for the Tribunal to modify the existing notice and renewal provisions to comply with the Regulation. In doing so, the Tribunal held the right not to renew in paragraph 22 of the Dealer Agreement was void and was therefore removed and based on agreement of counsel, the automatic renewal clause was deemed to constitute the notice of intent to renew contemplated by the Regulation.

[8] We agree with Justice Molloy's holding that the manner in which the Tribunal applied Regulation 123 to the Dealer Agreement in this case is a mixed question of fact and law and is not subject to review by this Court.

[9] The Tribunal went on to find the September 30, 2006 notice of non-renewal was void as it breached the Regulation because; (1) it was based on the void automatic renewal provision, (2) it did not give Chesterman the required period to address the concerns raised and (3) it did not adequately set out the reasons for the non-renewal. The Regulation provided that if the

distributor intends to refuse the renewal, it must give 45 days notice to the dealer stating the reasons for the refusal. The dealer then has 15 days to address the identified concerns.

[10] The Tribunal was not satisfied that CNH's letter of September 20, 2006 complied with the requirement of the Regulation that the distributor provide written reasons for the refusal to renew so that the dealer could then address the concerns within the allowable 15 days. We are of the view that the nature and adequacy of the reasons for non-renewal provided by CNH are matters of fact arising from the dealings between the parties and clearly do not engage questions of law. They are likewise not subject to review by this Court.

[11] The Tribunal in its reasons under the heading "11. Liability for Ending the Relationship" summarized the reasons for its conclusion that CNH had not met its burden to prove on the balance of probabilities that it did not unreasonably withhold renewal approval. The Tribunal stated (referring to Chesterman as "CFEI") at pages 32-33:

> CNH breached the Regulation and the Dealer Agreement (as amended by the Regulation) by failing to follow the regulated renewal process.
>
> Subsection 3(4) introduced "unreasonableness" as a control over a distributor's ability to refuse to approve renewing a dealer agreement. The distributor cannot unreasonably withhold renewal approval.
>
> What is unreasonable is determined from the factual context (see *1193430 Ontario Inc. v. Boa-Franc Inc.* [2005] O.J. No. 4671 (C.A.) at para 45) that includes the following, all of which are findings of fact:
>
> - The parties had a 19 year business relationship.
> - The Dealer Agreement was drafted by CNH with no input from CFEI.
> - CFEI premises were subject to inspections and grading by CNH.
> - CFEI's business performance was tracked and graded by CNH.
> - CFEI received CNH's President's Prestige Award commending CFEI's business premises standards for 2004-05 and 2005-06.
> - CFEI had a substantial investment dedicated to selling and servicing CNH's products.
> - Between 2000-2006, CNH sales and service accounted for the majority of CFEI's business.
> - CNH's Market Representation Manager who recommended non-renewal did so without ever visiting CFEI.

- No other senior CNH representative visited CFEI before the non-renewal decision.

- CNH did not issue CFEI any written warnings its dealership status was in jeopardy.

- CNH did not tell CFEI its complete reasons for non-renewal.

- CNH did not give CFEI any opportunity to develop a plan for curative measures to address CNH's concerns.

- As illustrated on the Market Rep Action Form, CNH's processes provide for curative action plans for dealers subject to termination under paragraph 23 of the Dealership Agreement but not for dealers subject to non-renewal.

- Between September 30th, 2006 and December 31st, 2006, CFEI had to repay almost $1 million in credit financing extended by CNH's credit arm.

- While the repayment time was eventually extended by CNH, repaying the debt forced CFEI into a distress situation where it had to discount its new and used equipment inventory to generate sales to create cash flow to fund the debt repayment.

- The Minister, under powers granted under the Act, enacted a Regulation removing CNH's right not to renew the Dealer Agreement and requiring CNH not to unreasonably withhold renewal approval.

(…)

The Regulation recognizes it is unreasonable to withhold renewal approval without giving a dealer written notice of the distributor's non-renewal reasons and a chance to address the distributor's concerns.

Therefore, if the Tribunal notionally considered the September 30th, 2006 letter as CNH's required written notice under the Regulation, we find that CNH failed to fully explain its non-renewal decision, and it also failed to give CFEI an opportunity to address its concerns. In this hypothetical and the circumstances, we would therefore find CNH to have unreasonably withheld renewal approval and to have breached the Regulation.

[12] The Tribunal stated in the section of its reasons quoted above that "what is reasonable is determined form the factual context" and further observed that the numerous considerations listed are "findings of fact". We agree with the Tribunal. The considerations leading the Tribunal to its decision are not, in any event, questions of law, and therefore, this Court has no jurisdiction to intervene.

[13] This Court must follow the governing jurisprudence from the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 and the Supreme Court's more recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, 2014 SCC 53, both of which discuss the distinction between questions of law and questions of mixed law and fact.

[14] *Sattva* dealt with the right of appeal from the decision of an arbitrator engaged in the interpretation of a commercial contract. The applicable legislation provided, as in the present case, for a right of appeal only on a question of law. The issue in *Sattva* was the meaning of "market price" in the contract, as that would in turn determine Sattva's share entitlement by way of a finder's fee provided for in the agreement. The Court held that this was a question of mixed fact and law and confirmed that, in future, contractual interpretation would normally be viewed as a question of mixed fact and law. The Court disapproved the historical approach which was to view issues of contractual interpretation as questions of law.

[15] In *Sattva*, the Court outlined the policy basis for the important distinction between questions of law and questions of mixed fact and law:

> **51** The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:
>
> a) If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be

> drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

> **52** Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

[16] The Court also advised that the concept of extricable questions of law would have extremely limited application:

> **53** Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.
>
> **54** However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:
>
> > a) Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact".

> Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" ... . [para. 36]

[17] We find no extricable questions of law in the Tribunal's ruling as to the unreasonableness of CNH's decision not to renew. The Tribunal's decision was based on a consideration of the historical relationship of the parties and the events and communications surrounding the decision not to renew. This specialized Tribunal's assessment of reasonableness in all the circumstances is entitled to deference. In any event, there is no right of appeal on these matters as they are not questions of law.

[18] We agree with Justice Molloy's opinion that the Tribunal erred in law in awarding damages in the sum of approximately $80,000 for the value of special tools and materials Chesterman had purchased from CNH. Neither the Regulation nor the terms of the Dealer Agreement imposed any such repurchase obligation on CNH. The fact that this loss was "reasonably foreseeable" in the Tribunal's view, does not provide a legal basis for this award in the context of the contractual relationship between the parties. There was no legal basis for this award and it must be set aside.

[19] Similarly, the issue of the Tribunal's power to award prejudgment interest is a question of law and we would share Justice Molloy's opinion that the Tribunal had such power for the reasons she has provided. We also agree that this Court ought not to interfere with the Tribunal's exercise of discretion in determining the applicable rate of interest.

[20] We further agree that the Tribunal's disposition of costs reflects errors of law in several respects as discussed comprehensively in Justice Molloy's reasons, and must be remitted to the Tribunal for reconsideration in accordance with this Court's ruling.

[21] Chesterman's cross-appeal relates to the quantum of damages awarded and does not engage any question of law. Accordingly, the cross-appeal is dismissed.

Conclusion and Order

[22] For the Reasons set out above, the decision of the Tribunal dated March 24, 2014 is upheld except with respect to the award for obsolete assets, which is set aside. The appeal by CNH is otherwise dismissed and the cross-appeals by Chesterman are dismissed.

[23] The costs decision of the Tribunal dated June 9, 2014 is quashed. The issue of costs is remitted to the Tribunal to be reconsidered in light of this Court's rulings as to the jurisdiction for awarding costs and the relevant factors to be taken into account, as well as the Tribunal's Rules and s. 17.1 of the *SPPA*.

[24] The costs of the appeals to this Court shall be dealt with in writing. The submissions of CNH, supported by dockets or docket summaries, shall be forwarded to the Court within 30 days of the release of these Reasons. Chesterman shall deliver its responding submissions, including its own dockets or docket summaries, within 15 days of the delivery of the CNH submissions.

CNH shall then have a brief write of reply, if it sees fit, to be delivered within 7 days of the Chesterman submissions.

HAMBLY J.

HACKLAND J.

MOLLOY J. (dissenting in part):

A. INTRODUCTION

[25] This is an appeal from decisions of the Agriculture, Food and Rural Affairs Appeals Tribunal ("the Tribunal"). In a decision dated March 24, 2014, the Tribunal held that CNH Canada Ltd. ("CNH") had improperly terminated a dealer agreement with Chesterman Farm Equipment Inc. ("Chesterman") and awarded $200,516.61 in damages to Chesterman (being approximately $60,000 for lost profit, $80,000 for obsolete assets, and $60,000 in pre-judgment interest). For Reasons dated June 9, 2014, the Tribunal awarded partial indemnity costs to Chesterman in the amount of $376,338.05.

[26] CNH appeals from both the damages and costs decisions. Chesterman cross-appeals from the damages award for lost profits, submitting that this head of damages was wrongly calculated and should be higher.

[27] Chesterman is a family-owned and run business, located in Tilsonburg, Ontario, and sells farm equipment and implements. CNH manufactures and then distributes farm implements throughout Canada. CNH (and its predecessor company, New Holland) supplied farm implements to CNH, which CNH then resold to the public. The relationship between Chesterman and CNH was governed by a Dealer Agreement executed in December 1999 and to take effect on January 1, 2000. The agreement provided for a two-year initial term with automatic one-year extensions thereafter unless, at least 90 days prior to the expiry of the term, one party gave the other notice of its intent not to extend.

[28] On September 30, 2006, CNH gave written notice that it would not be extending the agreement for the 2007 year. There is an issue as to whether that notice was effective to terminate the agreement.

[29] Meanwhile, on April 25, 2006, Ontario Regulation 123/06, made under the *Farm Implements Act*[1] came into force. The Regulation prescribed certain mandatory terms that must be included in any farm implement dealership agreement, including terms dealing with the renewal of such agreements. There is an issue as to whether, and in what manner, the Regulation applied to the ongoing agreement between CNH and Chesterman.

[30] The Tribunal held that the Regulation should be given retrospective effect and applies to the agreement between CNH and Chesterman. My two colleagues and I agree, although not for the same reasons as expressed by the Tribunal. We also agree that the manner in which the Tribunal incorporated Regulation 123 into the agreement between CNH and Chesterman is a question of mixed fact and law and not reviewable by this Court.

[31] The Tribunal further held that the September 30 notice delivered by CNH under the Dealer Agreement was invalid and constituted a breach of contract. The Tribunal also found that the September 30 notice failed to give Chesterman an opportunity to address the concerns raised and that this termination was unreasonable. My colleagues are of the view that these are questions of mixed fact and law and are not reviewable by this Court. On these issues, we disagree. For the reasons that follow, I believe that the Tribunal erred in law when it held that the September 30 notice was invalid and also erred in law in finding that it failed to give CNH an opportunity to respond. I would therefore have set aside the Tribunal's finding of breach of contract, and its award of damages and costs. My colleagues, however, uphold the breach of contract finding.

[32] The parties raised three issues with respect to the Tribunal's award. CNH challenges the basis for the Tribunal's award based on obsolete items (such as tool and manuals purchased by Chesterman over the years that were of no use to Chesterman once the dealership agreement was at an end. My colleagues and I agree that the Tribunal erred in law in making this award and that it must therefore be quashed.

[33] On the remaining issues, the Panel is unanimous. We find the Tribunal does have jurisdiction to include interest in any damages award it makes. The manner of calculating that interest is not a question of law and we would not interfere. The cross-appeal by Chesterman (with respect to the quantum of the award for loss of profits) is dismissed as it does not raise a question of law, but rather a question of mixed fact and law. Finally, we are all of the view that the Tribunal erred in law with respect to the basis upon which it awarded costs. In the result, the Tribunal's decision dated March 24, 2014 is upheld in its entirety. The Tribunal decision dated June 9, 2014 is set aside and the issue of costs is remitted to the Tribunal for its reconsideration based on the directions set out herein.

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[1] *Farm Implements Act*, R.S.O. 1990, c. F4

B. JURISDICTION and STANDARD OF REVIEW

[34] An appeal lies to this Court from decisions of the Tribunal pursuant to s. 5(7)-(9) of the *Farm Implements Act* (the "Act"), but solely on a question of law. This Court is empowered to make "any order that it considers proper" or may refer the matter back to the Tribunal with directions.

[35] The parties agree that a standard of correctness applies to the legal questions raised on this appeal.

[36] The result in this appeal hinges on the distinction between what can be characterized as a question of law, as opposed to a question of mixed fact and law. It is not an easy issue to resolve. It is on this point, and only on this point, that I disagree with my two colleagues.

[37] The Supreme Court of Canada dealt with this vexing issue in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*[2], ("*Southam*") stating as follows (at para. 35):

> . . . Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

[38] In *Southam*, the Supreme Court also reiterated (at para. 37) the governing principle that "as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed fact and law." Iacobucci J. (writing for the unanimous Court) then stated:

> Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

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[2] *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1977] 1 S.C.R. 748

[39] In elaborating on this principle, the Court in *Southam* referred to its earlier decision in *Pezim v. British Columbia (Superintendent of Brokers)*[3] and made a point that is particularly apt for the case now before this Court – there is a distinction between applying a legal test to the words of a contract (which is a question of mixed fact and law) and applying the same legal test to the same words but where those words are contained in a statutory provision (which is a question of law). Iacobucci held (at para. 36):

> For example, the majority of the British Columbia Court of Appeal in *Pezim*, *supra*, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely -- that newly acquired information about the value of assets can constitute a material change -- was a matter of law, because it had the potential to apply widely to many cases. [emphasis added]

[40] The Supreme Court in *Southam* also noted another example of a question that might look like a question of mixed fact and law, but is actually a question of law. It is not enough for the Tribunal to accurately state the applicable law. It must actually apply that law by considering all of the relevant factors required by the applicable law. Iacobucci J. provided the following helpful example of this principle (at para. 39):

> . . . After all, if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

And further, (at para. 41):

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[3] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557

> . . . If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact.

[41] Another important case dealing with the distinction between a question of law and a question of mixed fact and law is the Supreme Court of Canada's more recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*,[4] which involved an appeal from a commercial arbitration award as to the quantum of a finder's fee payable to Sattva by Creston under a private agreement between the two companies. The parties agreed that Sattva was entitled to a finder's fee of US$1.5 million and was entitled to be paid this fee in shares of Creston, cash or a combination thereof. However, they disagreed on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled. The arbitrator's decision turned on the interpretation of the term "market price" as defined in the contract between the parties.

[42] The applicable legislation provided a limited right of appeal from the arbitration decision, but only on a question of law, with leave. In the first instance a judge of the British Columbia Supreme Court denied leave on the basis that the issue raised was one of mixed fact and law and not subject to appeal. The British Columbia Court of Appeal reversed the lower court, finding the issue to be a question of law, and granted leave.

[43] The Supreme Court of Canada ruled that leave to appeal should not have been granted because the issue raised was a question of mixed law and fact. In coming to that conclusion, the Supreme Court referred to the historical approach to issues of contract interpretation, which was to treat such issues as questions of law, and then specifically decided to abandon that approach in light of two developments in the law.

[44] The first legal development cited by Rothstein J. (for the unanimous Court) is the more modern approach to contract interpretation, which is to take into account the factual matrix, considering all of the surrounding circumstances, with a view to determining the intention of the parties to the contract. This, the Court noted, is not driven by the absolute meaning of the words used, but by what the parties intended. Rothstein J. held:[5]

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

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[4] *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53

[5] *Sattva, supra,* at para. 48, citing with approval the decision of Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 at p. 115(H.L.)

[45] The second legal development cited by the Court in *Sattva* is derived from more recent Supreme Court of Canada decisions as to the nature of a question of law, which, Rothstein J. noted, do not fit well with the historical approach to contract interpretation. In particular, Rothstein J. referred to the decision in *Southam* (to which I referred above) and to the Court's landmark decision on standards of appellate review in *Housen v. Nikolaisen*[6] [2002] 2 SCR 235, 2002 SCC 33.

[46] In discussing *Southam,* the Court emphasized the underlying rule that the more particular an issue is to the parties, the more it will be characterized as a question of mixed fact and law. On the other hand, issues that have a broad general application are more likely to be treated as questions of pure law. He stated as follows (at para. 51):

> The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal. [emphasis added]

[47] The Court in *Sattva,* applying *Housen,* referred to the importance of deference to fact-finders as "promot[ing] the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings" and held that, for the same reasons, it is important to accord deference to fact-finders determinations of contractual interpretation. In coming to that conclusion, the Court reasoned that, "The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties."[7]

[48] The Court in *Sattva* also endorsed its previous ruling in *Housen* that where a court is engaged in determining a question of mixed fact and law, pure questions of fact may nevertheless be extricable. It is only where the legal principles and findings of fact are inextricably interwoven that the issue will be regarded as a question of fact and law from which there is no appeal.

[49] Rothstein J. held (at para. 53):

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[6] *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235, 2002 SCC 33

[7] *Sattva, supra,* Note 4, at para. 52, citing *Housen* supra Note 6 at paras 16-17.

> Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[50] Thus, where a legal issue can be extricated from the facts, it is subject to appeal. Further, in the course of contract interpretation, legal errors can be made, including: applying an incorrect principle; considering a factor that is not legally relevant; failing to consider a relevant factor; and failing to consider an aspect of the correct legal test. All such errors, are subject to appeal. Finally, a distinction must be made between questions of broad application, including statute interpretation (which are questions of law), and questions of contract interpretation that affect only the particular parties involved (which are questions of mixed fact and law).

C. THE RELEVANT PROVISIONS OF THE DEALER AGREEMENT

[51] The Dealer Agreement was executed by the parties on December 3, 1999. It took effect on January 1, 2000 and was stipulated to continue to December 31, 2002, unless terminated by either party earlier.

[52] Under the Dealer Agreement, Chesterman could sell farm implements anywhere, but its primary area of responsibility ("PMR") was stipulated to be Elgin, Oxford and Haldimand-Norfolk Counties. Chesterman agreed under Clause 4 of the Agreement that it would "promote vigorously and aggressively" the retail sales of CNH's products and agreed to obtain a reasonable share of the market in its PMR for CNH products. Further, in the same Clause, the parties agreed that a reasonable market share would be 90% of the average market share that CNH products achieve in Ontario or in a regional sales area, it being the sole discretion of CNH whether such performance would be based on sales in the regional sales area or the province as a whole.

[53] Under the Dealer Agreement, Chesterman was required to perform warranty and policy service and was obligated to keep in inventory all special tools, equipment and machinery needed to service CNH's products.

[54] The Dealer Agreement provided various grounds upon which CNH can terminate it for cause without notice, none of which apply here. In addition, paragraph 23(c) provided that in the event "that a party has failed to fulfill any of that party's responsibilities" under the Agreement, the other party may terminate by giving 30 days written notice.

[55] The Agreement specifically provided for automatic one-year extensions after December 31, 2002 "unless at least ninety (90) days prior to the expiration date of the original term or any extension term either party notifies the other of its intention not to extend." The Agreement further stated that, upon such notification, the Agreement would expire on December 31, 2002 or at the end of any such extension period. This is set out in paragraph 22 of the Dealer Agreement, which is a pivotal provision in this appeal. It states:

> 22. DURATION
>
> Unless terminated earlier in accordance with the terms hereof, this Agreement shall continue from the date first set forth above until December 31, 2002. The Agreement shall be extended for successive one-year terms unless at least ninety (90) days prior to the expiration date of the original term or any extension term either party notifies the other of its intention not to extend. Upon such notification, this Agreement shall expire on December 31, 2002 or at the end of any such extension period. The Dealer understands that this Agreement is of a limited duration and agrees that it has not relied on any representation regarding the continuation of the Agreement or its benefits beyond the initial term or any subsequent term. [emphasis added]

[56] The Dealer Agreement was automatically renewed for the years 2003, 2004, 2005 and 2006. The 2006 term would expire on December 31, 2006 unless, at least 90 days before that, written notification was given by one of the parties that it did not intend to renew. The notice by CNH given on September 30, 2006 was more than 90 days prior to the expiry of the term. If otherwise effective, the Agreement would expire at the end of its term on December 31, 2006.

D. THE RELEVANT PROVISIONS OF THE ACT AND REGULATION 123/06

[57] The *Farm Implements Act* regulates aspects of the relationships between manufacturers, distributers, dealers and buyers of farm implements. The Act stipulates in s. 33 that the rights, duties and remedies provided are "in addition to the rights, duties and remedies under any other *Act* and the common law." The Act first came in force in 1988 and has been amended from time to time. There were significant amendments in 2005, including ** and imposing minimum buy-back provisions. Also, prior to 2005, the power delegated to make regulations was limited to "prescribing information to be included in agreements referred to in subsection 3(4). This was amended to include the power to "set out legal rights and obligations for parties to the agreement."

[58] Regulation 123 under the Act was enacted pursuant to the expanded regulation-making power and came into force on April 25, 2006. The Regulation provided for certain mandatory terms that must be included in dealer agreements. Within the wording of the Regulation, Chesterman was a "dealer" and CNH was a "distributor." Section 1 provides that the terms are mandatory. It states as follows:

Mandatory terms

1. (1) The terms set out in sections 2 and 3 are prescribed as the mandatory terms that must be included in any dealership agreement under subsection 3 (4) of the Act.

(2) The mandatory terms set out in sections 2 and 3 are deemed to form part of any dealership agreement even if the agreement fails to include them as required.

(3) A provision in a dealership agreement that limits, varies or attempts to waive a term set out in sections 2 and 3 is void.

[59] For purposes of this appeal, the relevant terms imposed by the Regulation under s. 3 provide:

3. (1) The dealer has the right, and the agreement shall not be interpreted as interfering with the right of the dealer to,

(b) renew or transfer the dealership agreement;

(3) A dealer who wishes to renew or transfer a dealership agreement under clause (1) (b) shall notify the distributor in writing of that fact.

(4) A renewal or transfer of a dealership agreement under clause (1) (b) is subject to the approval of the distributor, which approval shall not be unreasonably withheld.

(6) If the distributor intends to refuse the transfer or renewal of the dealership agreement, the following rules apply:

1. The distributor shall notify the dealer in writing of the reasons for the refusal, within 45 days of receiving the request for approval.

2. If the distributor fails to notify the dealer within the 45-day period, the transfer or renewal is deemed to be approved.

3. The dealer shall be allowed 15 days from receipt of the notice to address the concerns underlying the refusal.

4. After the 15-day period has passed, the distributor may, subject to subsection (3), refuse the transfer or renewal.

(7) The distributor has the right to set sales targets that are fair and reasonable.

[60] Upon termination or expiration of an agreement, sections 23 to 30 of the Act impose a number of provisions with respect to the distributor's obligation to buy-back certain products from the dealer and the prices at which that is to be done. The Act specifies (at s. 23(2)) that these provisions "apply to a dealership agreement that is in effect on or after January 1, 1990."

E. FACTUAL BACKGROUND – THE PURPORTED NOTICE OF TERMINATION

[61] In May 2006, CNH hired a new Market Representation Manager, Mr. Mackow. As part of his responsibilities, Mr. Mackow conducted a review of dealer performance. Chesterman came up on his radar as a poor performer. More detailed reports were compiled, reviewing sales figures and market share for the current year, as well as for the three prior years. For those four years, Chesterman was significantly failing to meet its required sales level of 90% of the average market share for CNH products in Ontario. A review of the figures in July 2006 showed further poor performance. As a result, CNH decided not to extend the Dealer Agreement beyond December 31, 2006.

[62] On September 30, 2006, CNH gave written notice to Chesterman that it would not be extending the Dealer Agreement beyond its expiration date of December 31, 2006. The notice stated that the decision not to renew was based on "serious breaches" of s. 4(a) of the Dealer Agreement by failing to meet a reasonable market share as required under the Agreement. The notice specified that the sales levels were "severely deficient" during the period of the past four years and provided a chart demonstrating the persistent failure of Chesterman to achieve the required market share.

[63] The Tribunal found that there was no basis to reject the data set out in CNH's notice. Chesterman's sales figures were significantly below its required market share target and were declining year after year from 2003 to 2006.

[64] During the 92 days from the notice of non-renewal and December 31, 2006, Chesterman did not propose any plan to CNH as to how it could address its sales performance. Mr. Chesterman testified before the Tribunal that he asked his dealer representative if CNH would change its mind and was told "no", and also testified that he received no response from CNH when he proposed a merger with another CNH dealer.

F. THE PROCEDURAL HISTORY OF THIS CASE

[65] The proceedings were initiated with a complaint by Chesterman against CNH for improperly ending the Dealer Agreement. Mediation was not successful and the matter proceeded before the Tribunal. There were initially three issues: (1) a warrant issue; (2) liability for breach of contract; and (3) damages. The Tribunal decided to hear the case in two phases: Phase 1 would deal with the warranty and breach of contract issues; and Phase 2 would deal with damages. The Phase 1 hearing proceeded before the Tribunal for seven days commencing

October 18, 2010. The Tribunal's written decision on these issues was delivered on March 17, 2011.

[66] The warranty issue, which involved a number of intervenors, was dismissed.

[67] The Tribunal found in Chesterman's favour on the breach of contract issue. Its Reasons were brief. The Tribunal held that:

(a) Regulation 123 applied to the Dealer Agreement with the result that the right to not renew in paragraph 22 was removed and was void.

(b) Based on the agreement of counsel, the automatic renewal clause was deemed to be the notice of intent to renew under the Regulation.

(c) The September 30, 2006 notice by CNH was based on paragraph 22, which was void, and therefore breached the Regulation.

(d) Even if the September 30, 2006 letter was treated as CNH's refusal to approve Chesterman's requested renewal, it did not comply with the regulations because it did not give Chesterman the required period to address the concerns raised.

(e) Therefore, CNH breached the contract.

[68] CNH appealed to the Divisional Court from the March 17, 2011 decision. CNH sought to adduce fresh evidence before the Divisional Court to the effect that its counsel either did not, or did not intend, to concede before the Tribunal that the automatic renewal clause satisfied the requirement to give notice of intent to renew.

[69] The Divisional Court remitted the matter to the Tribunal with directions. The Court gave oral reasons in which Aston J. stated that one of the reasons for remitting the matter to the Tribunal was the inability of the Court to determine what was agreed to by counsel at the initial hearing. In addition, the Court stated that the Tribunal should have the opportunity to deal with issues not expressly addressed in its Reasons, including: (1) whether Regulation 123 has retroactive or retrospective effect; (2) notwithstanding the agreement of counsel, whether the interplay between the Regulation and paragraph 22 needed to be interpreted consistently, rather than finding paragraph 22 valid as notice of intent to renew for Chesterman but void and unenforceable for the non-renewal by CNH; (3) whether the Regulation required CNH to give written notice it was withholding approval of renewal and an opportunity to cure any defect or address the concerns raised; (4) whether the opportunity to cure was rendered academic by Chesterman's inability to address the concerns or by some other reason; and (5) whether CNH's actions could be said to be unreasonable although not unconscionable or in bad faith.

[70] The hearing then proceeded again before the Tribunal,[8] between February and November, 2013, for ten days of evidence and submissions on the issues remitted by the Divisional Court and the issues of damages. The Tribunal's decision on these issues was released on March 24, 2014, and is the subject of this appeal. Subsequently, the Tribunal received written submissions as to costs and released its written decision on costs on June 9, 2014, which is also the subject of this appeal.

G. THE REASONS OF THE TRIBUNAL ON DAMAGES

(i) Applicability of Regulation 123

[71] The Tribunal held that Regulation 123 applied retrospectively to the Dealer Agreement in this case, notwithstanding that the Agreement was four months into the 2006 term when the Regulation came into force. The Tribunal identified the starting point of its analysis as being the language used in s. 1 of the Regulation, and in particular that both ss. 1(1) and 1(2) provide that the mandatory terms apply to "any" dealer agreement. The Tribunal stated (at p. 19):

> "Any" in this context is an expansive and all-encompassing word that infers dealer agreements in the existence (past) and dealer agreements yet to be made (future).
>
> There is no temporal limitation in the *Regulation* suggesting applying the *Regulation* begins with dealer agreements made after the enactment date of April 25, 2006.

[72] The Tribunal contrasted the word "any" in the Regulation with various sections of the Act (ss. 3(2), 8(9) and 23(2)) that use temporal reference mechanisms and concluded that the absence of such language in the Regulation meant that the Legislature did not intend to limit its application temporally.

[73] The Tribunal rejected the applicability of the reasoning of the Supreme Court of Canada in *Upper Canada v. Smith*[9] in which the Court considered the words "shall be in writing" in amendments to the *Statute of Frauds* as being prospective and therefore not operating to affect pre-existing oral agreements to pay commission on the sale of land. The Tribunal reasoned that the Supreme Court was not suggesting that every time the words "shall be in writing" are used, a statute must be given a prospective interpretation and also noted that this decision was made in

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[8] By February 2013, one of the original three members of the Panel had been appointed as a Justice of the Peace and resigned from the Tribunal. The hearing proceeded before the remaining two members, which is provided for in the legislation and not the subject of any dispute.

[9] *Upper Canada v. Smith*, [1920] 61 S.C.R. 413

1920, prior to the more modern approach to statute interpretation subsequently taken by the Supreme Court in cases such as *Rizzo Shoes*.[10]

[74] The Tribunal held (at p. 24) as follows:

> As previously noted, the Tribunal determined that the Legislature, by the express words "any dealership" in the *Regulation*, communicated an intention of retrospective application of the *Regulation*. Therefore, in our view, there is no ambiguity in the *Act* or *Regulation* that requires resolution by applying the principle against interfering with vested rights. Here, the Legislature understood it was interfering with vested rights by giving the Minister the authority to prescribe "legal rights and obligations." None of the stakeholder parties could have been surprised by the legislative amendments incorporating some regulatory control over contract terms. The issues of dealer purity and dealer termination had been the matter of legislative debate and stakeholder discussions between at least 2001 and 2005. During that four year period, the [CNH-Chesterman] Dealer Agreement, as an illustration, renewed at least four times. The Tribunal finds it difficult to accept that in that context, dealers, manufacturers and distributors would not understand the contractual landscape was evolving and that "vested rights" might be affected at the moment of any legislative change.

[75] In the result, the Tribunal found that Regulation 123 applied retrospectively and that the mandatory terms must be read into the CNH/Chesterman Dealer Agreement.

(ii) Incorporating Regulation 123 into this Dealer Agreement

[76] The Dealer Agreement in this case already gave greater renewal rights to the dealer than were required, in some respects, under the new Regulation. Under paragraph 22 of the Dealer Agreement, the Agreement renewed automatically unless one of the parties gave 90 days' notice of its intention not to renew it. Under the Regulation, a dealer is required to give written notice that it wishes to renew a dealer agreement. Such a renewal is subject to the approval of the distributor, but s. 3(4) provides that approval shall not be unreasonably withheld. If the distributor intends to refuse the renewal, the distributor must give 45 days' notice to the dealer stating the reasons for the refusal. The dealer then has 15 days to address the concerns underlying the refusal.

[77] The Dealer Agreement in this case contemplated the possibility of its terms being contrary to legislation and provided as follows in Clause 31:

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[10] *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 ["*Rizzo Shoes*"]

> If performance or enforcement of this Agreement is unlawful under a valid law of any jurisdiction where that performance or enforcement is to take place, the performance or enforcement will be modified to the minimum extent necessary to comply with such law.

[78] One option for the Tribunal would have been to apply s. 1(3) of the Regulation which states that any provision in a dealership agreement that limits or varies a term set out in s. 3 is void. Section 3 contains the mandatory renewal terms. Applying s. 1(3) of the Regulation, the renewal term in the Dealer Agreement (which "varies" the terms of the mandatory provisions) would be void and would be replaced by the mandatory terms in the Regulation. Therefore, the process would be started by written notice from Chesterman that it intended to renew the Dealer Agreement. Chesterman did not give such a notice. Therefore, the Agreement would simply expire on December 31, 2006.

[79] The Tribunal did not take that approach. Instead, it held that it was appropriate to "read down" the language in the Agreement, or apply "notional severance." Therefore, the Tribunal rewrote paragraph 22 of the Dealer Agreement as follows:

> 22. DURATION
>
> Unless terminated earlier under the terms hereof, this Agreement shall continue form the date first set forth above until December 31, 2002.
>
> The Agreement shall renew for successive one-year terms unless the Dealer or the Company gives notice.
>
> For the Dealer, written notice to the Company prior to the end of the original term or any extension term that the Dealer will not renew.
>
> For the Company, written notice to the Dealer at least forty-five (45) days prior to the end of the original term or any extension term setting out the Company's non-renewal reasons.
>
> Upon receipt of such non-renewal notice from the Company, the Dealer shall have fifteen (15) days from receipt of the Company's notice to address the concerns underlying the Company's non-renewal notice.
>
> Upon expiry of the fifteen (15) days, the Company may not renew the Agreement; however, the Company's decision not to renew must not be unreasonable in the circumstances.

[80] The Tribunal found that this would meet the purpose and policy of the amendments (increasing fairness, competition and choice in the industry) and was in accordance with the "spirit" of paragraph 31 of the Dealer Agreement. Further, the Tribunal stated that such an approach "recognizes the historical reality about renewals as between CNH and [Chesterman]

and reflects the reality in the market." The historical reality between CNH and Chesterman was that their Agreement was renewed automatically every year without Chesterman needing to do anything. The "reality in the market" referred to by the Tribunal was based on the evidence of Barbara Leavitt, the President and CEO of the Canada East Equipment Dealers Association ("CEEDA"), a trade association representing farm equipment dealers such as Chesterman in liaison with industry and government. Ms. Leavitt testified that she polled approximately 300 equipment dealers in Ontario that comprise CEEDA's membership and the majority of them reported that their dealer agreements auto-renewed, unless terminated by one of the parties. Further, the members reported that none of them had given notice of an intent to renew prior to 2005 and only a handful had given such a renewal notice after 2005, and only then when she advised them to do so.

[81] With respect to the requirement under the Regulation that Chesterman provide notice of its intent to renew, the Tribunal held that the auto-renewal clause in the Dealer Agreement constituted written notice by the dealer of its intent to renew, as required under the Regulation. The Tribunal relied on the concession of CNH's counsel in the 2010 hearing that the auto-renew clause constituted notice of intent to renew. The Tribunal did not deal with when such a notice would be deemed to have been given, so as to trigger the distributor's right to refuse.

[82] The Tribunal also held (at p. 27) that in the particular circumstances of this case, the September 30, 2006 letter sent by CNH to Chesterman (indicating its intention not to renew) pre-empted Chesterman from giving its written renewal notice, made any renewal notice requirement from Chesterman "academic" and "relieved Chesterman of any requirement to give written notice."

(iii) Invalidity of the Non-Renewal Notice by CNH

[83] The Tribunal held that Regulation 123 required CNH to give Chesterman written notice that it was withholding renewal approval and an opportunity to address the concerns raised. However, the Tribunal found that the September 30, 2006 notice was not a written refusal to approve Chesterman's deemed notice of renewal, but rather an attempt to exercise a right under paragraph 22 of the Dealer Agreement that no longer existed in its original format. The Tribunal provided no explanation for that conclusion. It also did not address the specific concern raised by the Divisional Court in October 2011 as to the inconsistency in finding paragraph 22 valid for purposes of being notice of renewal, but void in respect of notice of non-renewal.

[84] The Tribunal went on to hold that even if it treated the CNH September 30 letter as the written notice of refusal required under s. 3(6) of the Regulation, it failed to comply with the Regulation. The Tribunal noted that the letter stipulated that the reason for non-renewal was the failure to achieve market share over a four-year period in breach of the Agreement. The Tribunal held that the actual decision not to renew this Agreement was made by Mr. Mackow, although it had been approved at senior levels and was signed by The Regional Sales Director, Real Prefontaine. Mr. Mackow testified at the hearing and in the course of his evidence stated four reasons behind CNH's decision not to renew: (1) poor "high power" tractor sales

performance; (2) lack of trained salespeople; (3) declining total revenue; and (4) poor hay and forage equipment sales performance. The Tribunal therefore concluded that because these four reasons were not specified in the September 30, 2006 letter, the notice did not comply with the Regulation which requires a refusal to renew to specify the reasons for that decision. The Tribunal stated (at p. 45), "In our view, it would not be fair of a distributor to decide not to renew and then only communicate some of the reasons behind the decision to the dealer."

(iv) Opportunity to Address Concerns

[85] The Tribunal also found CNH's notice to be invalid because it failed to provide Chesterman with the required 15 days to address CNH's underlying concerns. The Tribunal pointed out that no warning was given to Chesterman prior to the September 2006 letter. Further, the Tribunal found that CNH had already made up its mind that there was no "cure" possible for Chesterman's poor performance. The Tribunal held (at p. 31):

> There was no evidence about what [Chesterman] could have done to address CNH's underlying concerns, within a 15-day period.
>
> What Chesterman could have done is academic given CNH's determination made during the summer of 2006 that no opportunity to "cure" or address its concerns would have been effective. It was not open to CNH to overlook an entitlement to cure afforded by the *Regulation* because it believed the cure would be ineffective.

(v) Unreasonableness

[86] The Tribunal reiterated its previous conclusions from 2011 that it had found CNH's decision not to renew the Dealer Agreement was not unconscionable, unreasonable or in bad faith, within their contractual relationship. However, the Tribunal clarified that this did not mean that CNH's conduct was reasonable within the terms of the Regulation, which provided that the distributor's refusal to consent to a renewal request by the dealer could not be unreasonably withheld.

[87] Further, for many of the same reasons given for finding CNH's notice ineffective, the Tribunal found its conduct to be unreasonable under the Regulation; *e.g.* purporting to exercise a non-renewal right that no longer existed; failure to set out all of the reasons for non-renewal; and failure to provide Chesterman with an opportunity to address the concerns raised. In coming to that conclusion, the Tribunal acknowledged that there is no requirement under the Regulations for CNH to advise Chesterman that it had 15 days to address the concerns raised. However, again, the Tribunal ruled (at p. 33) that "CNH foreclosed any opportunity by their pre-determination that such an opportunity would not be effective." The Tribunal also referred to a number of other factors such as: the 19-year business relationship; the fact that it was a standard-form agreement drafted by CNH with no input from Chesterman; and the absence of any prior written warnings to Chesterman that its dealership was in jeopardy.

(vi) Finding of Breach

[88] Accordingly, the Tribunal held that CNH had breached the Regulation by not renewing the Dealer Agreement in accordance with the terms of the Regulation.

(vii) Damages for Loss of Profits

[89] Chesterman presented expert evidence on loss of profits based on a business valuation approach. The Tribunal rejected that evidence because the expert overlooked a key factor and because it failed to take into account that the Dealer Agreement was terminable on reasonable notice. As such, the business value approach, which looks at an income stream indefinitely, was found to be inappropriate.

[90] The Tribunal concluded that in all of the circumstances, including the long-standing business relationship between the companies spanning almost two decades, a two-year notice period was appropriate. Based largely on the expert witness called by CNH and the two-year notice period, the Tribunal awarded damages of $59,536.00 for loss of profits.

(viii) Damages for Obsolete Assets

[91] The Dealer Agreement required Chesterman to purchase special tools and manuals specific to CNH products. CNH tendered no evidence that these tools and manuals had any usefulness to Chesterman following termination as a CNH dealer. Chesterman claimed damages of $80,310 for these obsolete assets, based on estimates derived from 2006 pricing or internet information. The Tribunal held that it was reasonably foreseeable that Chesterman would suffer a loss in respect of these tools upon termination of the agreement. The Tribunal noted that CNH had disputed the valuation put on these items by Chesterman as being based on current prices, but that CNH presented no alternate value for the obsolete assets. The Tribunal awarded damages as claimed for the obsolete assets, in the amount of $80,310.

(ix) Other Heads of Damages

[92] The Tribunal dismissed Chesterman's claims for damages based on restocking fees, parts that were determined by CNH to be non-returnable, and losses caused as a result of the requirement to liquidate inventory. No appeal is taken from those rulings.

(x) Pre-judgment Interest

[93] The Tribunal held that it was set up as a dispute resolution process that was an alternative to the courts. Accordingly, it concluded that it had jurisdiction to award interest on the damages and that it would be appropriate to apply *Courts of Justice Act* pre-judgment interest rates for that purpose. Based on the *Courts of Justice Act* rate in December 2006 when Chesterman first sent notice of its claim, the Tribunal awarded interest at 6% per year from January 1, 2007 to March 24, 2014, for a total interest award of $60,670.61.

H. ANALYSIS : DAMAGES DECISION

[94] In my view, the Tribunals' conclusion that CNH breached the Dealer Agreement cannot stand. For the detailed reasons that follow, I would find as follows:

(i) The Tribunal erred in law in its analysis of whether Regulation 123 applied to the Dealer Agreement, in particular by failing to apply a presumption against retrospective application and by finding that the Regulation expressly applied retrospectively. However, even applying the presumption against retrospective effect, such an interpretation arises by necessary implication given the nature and intent of the legislation and the effect of applying the provisions only prospectively. Therefore, the Tribunal reached the correct conclusion that Regulation 123 applied.

(ii) The manner in which the Tribunal applied Regulation 123 to the contract in this case is a mixed question of law and fact and is not subject to review by this Court. Alternatively, if it is a question of law, I find no legal error.

(iii) Assuming the auto-renewal clause constituted notice of intent to renew by the dealer, the notice of September 30, 2006 by the distributor can only reasonably be interpreted as a rejection of that deemed notice of intent to renew. The Tribunal erred in law by finding that CNH could not refuse to renew because paragraph 22 of the Agreement was no longer in existence.

(iv) The September 30, 2006 letter from CNH set out the grounds for the non-renewal. There is no legal requirement that every possible ground for refusing a renewal be listed and the Tribunal erred in law in so finding. The Tribunal further erred in law by finding that Chesterman was not given an opportunity to respond to the concerns raised.

(v) The onus was on Chesterman to respond in some way to the concerns stated by CNH and its failure to do so was fatal to its claim that CNH had breached the Regulation. The Tribunal erred in law by finding to the contrary.

(vi) There is no need for an inquiry as to the reasonableness of CNH's refusal in light of Chesterman's failure to even attempt to address the concerns raised. However, on their face the grounds stated by Chesterman are reasonable given that they demonstrate a fundamental breach of a key term of the agreement going back four years – the failure to meet the market share requirement. The Tribunal erred in law in considering reasonableness at all. Further, in its consideration of reasonableness, the Tribunal erred in law by: (a) failing to take into account relevant factors (such as the longstanding breach of the market share terms of the agreement and the absence of any evidence that Chesterman did, or even could have, done anything to address those concerns); and (b) taking into account irrelevant and legally invalid factors (such as the failure of CNH to comply with the Regulation, CNH's reliance on a non-renewal clause that was void, the failure

> of the notice to set out all the grounds for non-renewal, and the failure to give Chesterman an opportunity to respond).

[95] I would, therefore, have set aside the March 24, 2014 decision of the Tribunal and determined that CNH was not in breach of its contract with Chesterman.

(i) Does Regulation 123 Apply to the Dealer Agreement?

[96] Although I agree with the conclusion of the Tribunal that Regulation 123 applied to the Dealer Agreement in this case, the Tribunal made a number of legal errors in its analysis that need to be addressed. The Tribunal accepted that its interpretation of the Regulation resulted in its having retrospective effect. It did not, however, apply the presumption against that interpretation, which ought to have been its starting point. The Tribunal erroneously found that the language of the Regulation constituted an express direction, in clear and unambiguous language, that it be given retrospective effect. I do not agree. I find the language of the Regulation to be ambiguous as to whether it would apply to contracts already in existence. However, the Tribunal then went on to look at the legislative history and intent of the Regulation. Based on that analysis, and the impact of applying a rigid prospective interpretation of the Regulation, I am of the view that a retrospective application of the Regulation arises by necessary implication and that the Regulation does apply to the circumstances before the Tribunal.

The presumption against retrospectivity

[97] First, I agree with the submissions of the appellant CNH that the Tribunal erred in starting its analysis of the retrospectivity issue from the wrong perspective. The Tribunal should have started its analysis by considering whether applying Regulation 123 to this Dealer Agreement in the fall of 2006 would interfere with vested rights of the parties. If so, the Tribunal should then have started from the presumption that the Regulation did not apply and then considered whether that presumption had been rebutted.

[98] The Tribunal did not take that approach. The Tribunal started its analysis by stating that the Regulation had retrospective effect. Even if that statement is taken as a pre-statement of its conclusion, with the analysis to follow, the Tribunal failed to consider the presumption against retrospectivity. Rather, the Tribunal merely examined the language used in the Regulation to determine the intention of the Legislature. That is an incorrect legal approach and a fundamental error of law.

[99] It is well-established that a statute with retrospective effect is one that takes away or changes tangible rights that have vested in a party. In *Épiciers Unis Métro-Richelieu Inc.*,

division "Éconogros" v. Collin,[11] the Supreme Court of Canada adopted the following explanation by Professor Dreidger as to what retrospectivity entails:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

[100] In *Épiciers*, Lebel J. stated (at para. 48) that "the signing of a contract usually creates rights and obligations, which are considered vested rights and which, generally speaking, remain subject to the former legislation." He concluded (at para. 47) that the legislation at issue in that case had retrospective effect because "[i]t applies to an event that has already happened, namely the signing of the suretyship contract, but governs only the future effects of the contract."

[101] Those principles apply in this case. Chesterman and CNH were parties to a contract entered into in 1999. The current term of the contract was for one year commencing January 1, 2006. Each of the parties had vested rights under it. One of the vested rights enjoyed by Chesterman was that the contract would renew automatically for successive one-year periods unless terminated or unless one party gave 90-day written notice of an intention to not renew it. The ability to give such a notice so as to prevent the renewal of the contract was also a vested right, in this case one which was particularly important to CNH. It is apparent that, but for Regulation 123 which came into force in April 2006, CNH could have ended the Dealer Agreement by delivering the notice it did in September 2006. Thus, applying the reasoning of the Supreme Court in *Épiciers*: (a) the parties had vested rights and obligations under the Agreement; and (b) the Regulation would have retrospective effect if it applied to the event that had already happened (whether it be the renewal of the Dealer Agreement for 2006 or the initial signing of the Agreement in 1999), and governed its future effects (in this case, how and under what terms it could be renewed or not renewed after the Regulation came into force).

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[11] *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] 3 S.C.R. 257, 2004 SCC 59 at para. 46, citing E. A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69

[102] It is also well-established that there is a presumption that a statute or regulation must "not be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act."[12]

[103] Further, the presumption against retrospectivity is even stronger for delegated powers (such as regulations). Ruth Simpson in *Sullivan on the Construction of Statutes*[13] describes it this way:

> It is presumed that the legislature does not intend to delegate a power to legislate retroactively, retrospectively or to interfere with vested rights. As Southin J.A. put it in *Casamiro Resource Corp. v. British Columbia (Attorney General)*, such a delegation would be out of keeping with Canadian notions of decent legislative behaviour.
>
> In practice, this means two things: (1) regulations and other forms of delegated legislation are presumed only to apply prospectively and not to interfere with vested rights; and (2) delegated legislation that claims to have retroactive application or to interfere with vested rights is presumed to be invalid. Both presumptions are rebuttable.

[104] As stated by the Supreme Court of Canada in *British Columbia (Attorney General)v. Parklane Private Hospital Ltd.*[14] (at para. 16):

> If *intra vires*, Order in Council 4400 would serve to extinguish retrospectively the entire claim of Parklane, but in my view it fails to have that effect. The Lieutenant Governor in Council is empowered to enact regulations for the purposes of carrying into effect the provisions of the Act, but nothing expressly or by necessary implication contained in the Act authorizes the retrospective impairment by regulation of existing rights and obligations.

[105] These general principles were also applied by the Federal Court of Appeal in *Apotex Inc. v. Merck Frosst Canada & Co.*,[15] in which Stratas J.A. held (at paras. 30-31):

> Merck is correct that the making of retroactive or retrospective regulations or regulations that interfere with vested rights on substantive matters must be authorized by the regulations' enabling provisions: R. Sullivan, *Sullivan on the*

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[12] *Gustavson Drilling (1964) Limited v. Minister of National Revenue*, [1977] 1 S.C.R. 271, 66 D.L.R. (3d) 449 at para. 11

[13] Sullivan, Ruth: *Sullivan on the Construction of Statutes* (6th Edition), Lexis Nexis Canada Inc. 2014, September 2014 at pp. 834-835 (citations omitted)

[14] *British Columbia (Attorney General)v. Parklane Private Hospital Ltd.*, [1975] 2 S.C.R. 47

[15] *Apotex Inc. v. Merck Frosst Canada & Co.*, 2011 FCA 329

> *Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008) at pages 670 and 727; *Attorney General for British Columbia v. Parkland Private Hospital Ltd.*, [1975] 2 S.C.R. 47 at page 60; *Ass'n Internationale des commis du détail v. Commission des Relations de Travail du Québec et al.*, [1971] S.C.R. 1043 at page 1048.
>
> Merck is also correct that subsection 55.2(4) of the *Patent Act* does not authorize the making of such regulations. The wording of subsection 55.2(4) is silent on the creation of regulations that have retroactive or retrospective effects or an interference with vested rights. Given its silence, subsection 55.2(4) must be interpreted as not authorizing such effects: *Smith v. Callander*, [1901] A.C. 297 at page 305.
>
> [emphasis added]

No express language requiring retrospective interpretation

[106] The Tribunal accepted that the Regulation affected vested rights, but found that this was intended by the Legislature. The Tribunal's main reason for concluding that the Regulation was intended to have retrospective effect was the use of the word "any" to modify "dealer agreements" in ss. 1(1) and 1(2) of the Regulation, which the Tribunal described as "an expansive and all-encompassing word that infers dealer agreements in existence (past) and dealer agreements yet to be made (future)." I do not agree with the tribunal that the word "any" constitutes a clear and unambiguous expression requiring such a broad application. If the word "any" in the regulation is a clear and unambiguous direction that the Regulation is to have retrospective effect, I would expect the same language to appear in the delegating power. I note, however, that the delegation in s. 35(c) of the Act 35 does not use that same language. It states:

> 35. The Minister may make regulations,
>
> > (c) prescribing information to be included in a dealership agreement and setting out rights and obligations for parties to the agreement [emphasis added]

[107] The Tribunal reasoned that the Legislature used the word "any" as opposed to "a" in the Regulation as a clear and unambiguous expression of its intention that the Regulation would have retrospective effect. Reading the word "any" in the manner suggested by the Tribunal would render the entire Regulation invalid. Applying that same analysis to the delegating power in the statute would mean that the use of the word "a" rather than "any" would not grant the power to create regulations with retrospective effect. To interpret the Regulation in a manner consistent with the powers granted under s. 35(c) of the Act would require interpreting "any" in the Regulation as the equivalent of "a" or "the" in the delegating section of the Act, which in my view is in keeping with the ordinary meaning of those words in any event. Thus, if the

Regulation is to have retrospective effect, it cannot be because of the use of the word "any" in the Regulation. To do so would create invalidity.

[108] Another basis relied upon by the Tribunal in giving the Regulation retrospective effect is the lack of any temporal references in the Regulation. The Tribunal contrasted this with temporal references in various provisions of the Act and reasoned that if the Legislature meant for the Regulation to be temporally limited, it would have said so.[16]

[109] Usually, the absence of temporal modifiers in a regulation means that the regulation will be prospective, applying only to the future and not changing any vested rights. The Tribunal erred in law by coming to the opposite conclusion. Again, the failure to apply the presumption against retrospective effect is the root of the problem.

[110] The provisions of the Act relied upon by the Tribunal were ss. 3(2), 8(9) and 23(2). Subsection 3(2) and sections 24 to 30 are long-standing provisions in the legislation, and were not part of the 2005 amendments to the Act and Regulations. In my view, an examination of these provisions of the Act does not support the Tribunal's conclusion as to restrospective effect. However, I do not consider the existence of some temporal limitations in the Act to be fatal to the Tribunal's ultimate findings on retrospectivity. That is because the provisions containing temporal limits must be considered in their historical context and in light of the legislative intent (a point to which I will return).

Retrospective application as a necessary implication

[111] The Regulation is assumed not to have retrospective effect, a presumption that can be rebutted by express language, or where it arises by necessary implication. As discussed, the use of the word "any" cannot be sufficient to constitute express language rebutting the presumption, nor is there any other express language capable of rebutting the presumption. The case law is clear that where the words of a statute are clear and unambiguous, there is no need to look to external sources to determine their meaning. Although holding that the words of this Regulation statute were clear and unambiguous, the Tribunal nevertheless looked at external sources as to the intent of the Legislature to assist its interpretation, perhaps as an alternative to its findings on the language being unambiguous.

[112] Unlike the Tribunal, I find that the use of the word "any" is not a clear expression that the Regulation is required to be given retrospective effect. On the contrary, I consider "any" to be ambiguous. Most dictionary definitions equate "any" with the word "every." Arguably, this is broader than the article "a" before the modified noun, but it does not necessarily involve a reference to the past. Because this is not completely clear, in my view it is relevant to consider

[16] Reasons of the Tribunal at p. 19

the legislative history and the purpose of the legislation to determine whether retrospective effect was the necessary intention of the drafters. In this regard, I agree with the ultimate decision of the Tribunal that the intention was to give retrospective effect to Regulation 123.

[113] The modern approach to statutory interpretation is now well-established and is conveniently summarized by LaForme J.A. in *1392290 Ontario Ltd and Riocan Holdings Ltd. v. Corporation of the Town of Ajax*,[17] as follows (at paras. 9-10):

> The modern approach to statutory interpretation, first set out in E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) is well-settled:
>
> > 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.
>
> The first step of statutory interpretation is to determine the meaning that "would be understood by a competent language user upon reading the word in their immediate context." The immediate context consists of as much of the text surrounding the words to be interpreted as is needed to make sense of those words and usually consists of the section in which the words appear: see R. Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007) at 50-51. Although the use of the past tense in s. 447.70(21)(c) is consistent with a retrospective application, in this case, a textual analysis is not necessarily conclusive. I accordingly turn to the appellant's three submissions, which speak to the legislative scheme and intention of the legislature.

[114] In *Riocan*, the Court of Appeal considered whether amendments to property tax legislation should be given a retrospective effect. The Court noted that the text of the provision contained the past tense, but found this was not conclusive and that an examination of the scheme and intent of the legislation was required. So too in the case before me; I do not see the use of the word "any" to be conclusive and an examination of the intent of the Legislature is therefore necessary.

[115] In *Riocan*, one of the issues considered by the Court was the motivation of the legislation, which was to rectify a taxation system that was seen as being "grossly out of date and, as a result, extremely unfair" because taxpayers in similar situations were paying very different

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[17] *1392290 Ontario Ltd and Riocan Holdings Ltd. v. Corporation of the Town of Ajax*, 2010 ONCA 37 ["*Riocan"*]; see also *Rizzo Shoes, supra*, Note 4

taxes." The motivation of the Legislature to rectify this unfairness was seen by the Court as a factor supporting the application of the legislation in a retrospective manner.[18]

[116] In the case now before this Court, it is clear from the legislative history that the Legislature was concerned about the power imbalance between large manufacturers and distributers of farm implements on the one hand and farm implement dealers on the other. The Legislature sought to ensure greater fairness for dealers and to foster competition and increased consumer choice by prohibiting exclusivity (or dealer purity) clauses in dealer agreements. Previously, many dealer agreements required dealers to carry the stock of only one manufacturer and prohibited them from selling other brands. The Legislature sought to remedy this situation by a provision added to the Act itself, through the 2005 amendments, which states:

> 3. (5) A dealership agreement shall not require that the dealer,
>
> (a) offer no farm implements or parts for sale at retail other than those manufactured by the manufacturer specified in the agreement; or
>
> (b) not make a dealership agreement with any other distributor.

[117] The Tribunal makes a compelling argument for why this provision must have been intended to apply retrospectively, as to do otherwise would create a great unfairness to existing dealers who were restricted by exclusivity or purity clauses, as compared to new entrants into the dealer markets who would have no such encumbrances.

[118] That is not a full answer to this question, however, as the Regulation deals with termination and renewal of dealer agreements, not dealer purity clauses. It does not necessarily follow that because some provisions in the Act are retrospective, the same interpretation must be given to the Regulation. Nevertheless, there is a link between these amendments in the Act and the enactment of Regulation 123. They were part of the same set of reforms meant to protect dealers who were subject to what were perceived to be unfairly one-sided agreements. Although not strictly speaking necessary for its analysis given its finding of clear and unambiguous language, the Tribunal heard evidence on this point and considered the history and intent of the amendments, through other sources such as *Hansard*. The Tribunal held that the reforms were also directed towards termination of dealer agreements by distributors and that unfairness in this process was part of the "mischief" that the amendments were meant to address. The Tribunal also found that all of the reforms were originally intended to be part of the same legislative amendments, but that it was then decided to deal with the contractual terms for terminations and renewals in a regulation instead, which would be both quicker and more flexible than putting such provisions in the Act itself. The Tribunal's factual findings in this regard are squarely within its area of expertise and are entitled to considerable deference.

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[18] *Riocan*, at paras. 13-16

[119] Given the motivation of the Legislature to level the playing field and remedy unfairness to dealers, it would not make sense to provide such relief only to dealers who were entering into new agreements with distributors, to the obvious detriment of dealers who were already parties to agreements and therefore labouring under the very unfairness the Legislature was seeking to redress.

[120] As I have already mentioned, the 2005 amendments to s. 3 of the Act included the addition of s. 3(5) to prohibit exclusivity clauses in dealer agreements. At the same time, changes were made to s. 3(4) of the Act. Previously, s. 3(4) merely stipulated that a dealership agreement "shall be in writing and shall contain the information that is prescribed. As a result of the amendment, dealership agreements were also required to contain the prescribed rights and obligations of the parties. A similar amendment was made to the delegating power in s. 35(c). It is useful to look at the amendments of these two provisions side by side. They are set out below with the 2005 amendments underlined for emphasis.

> 3. (4) A dealership agreement shall be in writing, shall contain the information that is prescribed and <u>shall contain the legal rights and obligations that are prescribed for the parties to the agreement, subject to subsection (5)</u>.
>
> 35. The Minister may make regulations,
>
> (c) prescribing information to be included in a dealership agreement and <u>setting out legal rights and obligations for parties to the agreement, subject to subsection 3(5)</u>;

[121] CNH submits that the language of s. 3(4), and in particular the words "shall be in writing," indicates that the section is to be given a prospective, rather than a retrospective interpretation. CNH relies on the Supreme Court of Canada's 1920 decision in *Upper Canada v. Smith* in which the Court considered similar language in the amendments to the *Statute of Frauds*. The amendment in that case stipulated that agreements to pay commissions for the sale of lands "shall be in writing." The Supreme Court held that in the absence of express words or necessary implication, the statute was not to be given retrospective effect and that the amendments therefore did not operate to prevent recovery of commissions based on oral agreements that preceded the amendments. CNH made this same argument before the Tribunal and the Tribunal stated that "it did not take the direction of the Supreme Court in the *Smith* case as suggesting every time the words 'shall be in writing' are used by a legislature or parliament that means a prospective rather than retrospective application of the legislation." I agree. The Supreme Court did not hold that the words "shall be in writing" created a prospective effect. It held that there is a presumption against retrospectivity in the absence of clear language or a

necessary implication to the contrary. Therefore, the *Smith* case does not assist in the interpretation of the subject Regulation or Act here, except with respect to these basic principles.

[122] Chesterman relies on the 1915 decision of the Alberta Supreme Court in *Chapin v. Matthews*.[19] Interestingly, the *Chapin v. Matthews* case involves a provision of Alberta's *Farm Machinery Act* which stipulated that no condition in "any agreement" shall be binding upon a purchaser of farm machinery if a judge determines it to be unreasonable. The plaintiff had entered into such an agreement and purchased a farm tractor before the enactment of the legislation, which tractor broke down after the legislation came into effect. The issue was whether the trial judge could apply the legislation and disregard a condition in the agreement he considered to be "unreasonable." On appeal, the Alberta Supreme Court noted that the Legislature had found that agreements for the sale of farm machinery often contained conditions that were "plainly unfair and unjust", which was the reason for the enacting the legislation. The Court held (at para. 19):, "When the legislature was confronted with the facts that unreasonable conditions were being continually inserted in such agreements, it seems to me quite contrary to reason to suppose that it intended to allow all unreasonable conditions created in the past to continue to operate, as they certainly did, with unfairness and injustice, and to withhold from the Court the new power of disregarding them while not extending the power and jurisdiction only to agreements thereafter entered into." Although this decision is not recent, it continues, in my view, to have resonance.

[123] Likewise, the decision of the Supreme Court of Canada in *Acme (Village) School District No. 2296 v. Steele Smith*,[20] although decided in 1933, continues to be relevant and analogous to the case at hand. In that case, the *Alberta School Act* was amended in 1931 to provide that except in the month of June, no notice terminating a teacher's engagement could be given without the prior approval of a school inspector. In July 1931, the School Board gave notice of termination to Mr. Steele, relying on a clause in the employment contract signed in 1929, which provided that the agreement would continue in force from year to year unless terminated on 30 days' notice. Thus, the contract was prior to the amendment and provided for automatic one-year renewals subject to 30 days' notice of termination. The question was whether the legislative amendment, which was subsequent to the contract being formed but prior to the termination, had any application to the termination – precisely the issue in this case. The Supreme Court of Canada held that the amendment applied, relying upon the intention of the legislation. Crockett J., writing for the majority, held:

> To confine the words to future contracts only would be, if not entirely to defeat the remedial object of the enactment, to at least render it ineffective for years to come in the great majority of schools of the province. There would, of course, be

[19] *Chapin v. Matthews* (1915), 24 D.L.R. 457 (Alta.S.C.)
[20] *Acme (Village) School District No. 2296 v. Steele Smith*, [1933] S.C.R. 47

> no contracts to which it would apply in any way at the time the Act was passed or at the time it came into force, and after that it would only be as existing contract were cancelled and new ones substituted here and there that the legislation could begin to speak.

[124] Although the Supreme Court of Canada's landmark decision in *Rizzo Shoes* did not involve the retrospective application of a statute, it nevertheless turned on a principle of direct application in this case – the interpretation of legislation so as to prevent inequality of its application and promote its underlying remedial purpose. At issue were the provisions of the Ontario *Employment Standards Act*, which stated that "no employer shall terminate the employment of an employee" without giving mandated periods of notice depending on length of service. The question that arose was whether these provisions applied if the employment was terminated by a creditor petitioning the employer into bankruptcy. The Ontario Court of Appeal had held that because the termination was caused by the act of bankruptcy, not by the employer, the statutory provisions did not apply and employees terminated at that point did not have a claim in the bankruptcy for termination pay and severance pay. The Supreme Court of Canada disagreed, restoring the decision of the trial judge, Farley J., that the employees affected were entitled to make those claims in the bankruptcy.

[125] Farley J. had ruled that denying the claims of employees terminated as a result of the bankruptcy would lead to the arbitrary and unfair result that an employee whose employment was terminated just prior to the bankruptcy would be entitled to termination and severance pay, whereas an employee whose termination resulted from the bankruptcy itself would not. The Supreme Court of Canada agreed, pointing out (at para. 28) that the absurdity of this consequence was particularly evident in a unionized workforce where seniority determines the order of lay-offs, such that it would be the most senior personnel who had been employed the longest and entitled to the largest amounts of severance pay who would be most likely denied any payment at all. The Supreme Court held (at para. 25) that this would be contrary to the "objects of the termination and severance pay provisions themselves [which] are broadly premised upon the need to protect employees." The Court held, further, (at para. 27) that this would be contrary to the principle of statutory interpretation that the Legislature does not intend to produce absurd consequences, defining as absurd interpretations that would be "extremely unreasonable or inequitable" or "incompatible . . . with the object of the legislative enactment."

[126] On the argument advanced by CNH, the provisions mandated to be part of dealer agreements would only apply to agreements entered into after the Regulation came into effect on April 2005. This would create inequality between those dealers whose contracts were already in existence at the time of the enactment, and those dealers who enter into agreements after April 2005. It is hard to understand how the Legislature could have meant to benefit only dealers in the future and to oblige existing dealers to continue under what the Legislature considered to be the very unfair provisions the Regulation was meant to address. In my opinion, those existing dealers are in the same position as senior personnel at Rizzo Shoes, in circumstances most deserving of relief, but cut out of legislative provisions meant to remedy the very mischief they are now facing. The result of not applying the Regulation to existing contracts would largely

defeat the intent of the Regulation, and require it to be implemented bit by bit as new dealers enter the market. That is not consistent with the remedial intent of the Regulation.

[127] Accordingly, I agree with the Tribunal that the Regulation applies to the Agreement between CNH and Chesterman, although not for the primary grounds advanced by the Tribunal. On a fair reading of the Tribunal's Reasons, I consider the "necessary implication" rationale for giving retrospective effect to the legislation to be an alternative basis for the Tribunal's decision. Even if that is not the case, since this Court has the discretion to substitute its decision for that of the Tribunal on a question of law, I would hold that the Regulation must be given retrospective effect on the basis I have described above and that it applies to the agreement at issue in this case.

(ii) Incorporating Regulation 123 into the CNH/Chesterman Agreement

[128] Regulation 123 provides in s. 1(3) that a provision in a dealership agreement that "limits, varies or attempts to waive a term set out in sections 2 and 3 is void." Given that the Dealer Agreement in this case has quite different provisions with respect to renewals than are provided for in s. 3(3) of the Regulation, the first question is whether those provisions of the Dealer Agreement are simply void.

[129] The Tribunal rejected such an approach for reasons I consider valid. The Regulation provides that where a dealer wishes to renew an agreement, the dealer is required to give notice in writing to the distributor. Chesterman's long-standing Agreement with CNH provided that it renewed automatically unless one of the parties gave 90 days' notice to the contrary. If the renewal clause is declared void, then Chesterman would have failed to deliver written notice of its intention to renew and would lose the right to do so. The Tribunal recognized the unfairness in that situation, as well as the fact that this would be contrary to the expectation of both parties. Further, the Tribunal heard evidence that 50% of the dealers in Ontario have similar auto-renewal clauses and none of those surveyed had felt it necessary to deliver written notices of an intent to renew after the Regulation came into effect.

[130] In those circumstances, the Tribunal elected to revise the contract language so as to make it compatible with the Regulation. That is consistent with the intention of the Regulation, principles of contract interpretation, and the agreement between the parties which provided (in paragraph 31) that if performance was unlawful, it should be "modified to the extent necessary to comply with the law." It was open to the Tribunal to apply this legal principle as opposed to a rigid application of the statutory provision finding the contractual terms void.

[131] In my view, the modifications proposed by the Tribunal, as set out in paragraph 39 above (p. 25 of the Tribunal's Reasons) are appropriate, reasonable, and in keeping with both the spirit of the legislation and the terms of the Agreement itself.

[132] Under this scenario, given the auto-renew clause, the Agreement itself is deemed to be written notice by Chesterman of its intent to renew. The Agreement would then renew

automatically unless CNH gives written notice to Chesterman at least 45 days prior to the end of term (which would be mid-November) setting out its reasons for non-renewal. Chesterman would then have 15 days to address the underlying concerns. At the expiry of the 15 days, CNH may elect to not renew the contract, but its refusal to renew must not be unreasonable in the circumstances.

[133] For the most part, this is a mixed question of fact and law. There is a preliminary legal issue as to whether the Tribunal had the option of incorporating the Regulation into the Agreement by essentially re-writing the terms of the Agreement or whether it was obliged to find the auto-renew clause to be void. In my view, the Tribunal was correct in law when it held that this re-writing option existed. The Tribunal's decision to take that route, and manner in which it incorporated the Regulation into the Agreement, are questions of mixed fact and law, and not subject to appeal. Alternatively, if they are questions of law, I agree with the Tribunal's conclusion. I find no error.

(iii) Validity of Non-Renewal by CNH

[134] The Tribunal held that Chesterman was not required to deliver a written notice that it intended to renew on the grounds that the auto-renewal clause in the Dealer Agreement satisfied the written renewal request requirement in the Regulation. I find this to be correct in law regardless of whether it was conceded by counsel, regardless of whether that concession was clear, and regardless of whether counsel could or did withdraw such concession. In all of the circumstances, including the express terms of the Agreement that it should be modified only to the extent necessary to make it lawful, the automatic renewal of the contract should continue year after year. It follows that unless Chesterman expresses a contrary intention, it intends to renew, and that intention is embodied in the written Agreement between the parties.

[135] I also accept the Tribunal's reasoning that any requirement to deliver a written notice to renew was obviated in any event by the notice delivered by CNH on September 30, 2006, stating that it was not renewing the Agreement at the end of its term.

[136] The Tribunal then held that the September 30, 2006 notice from CNH was invalid because: (1) it purported to exercise a right to non-renewal under paragraph 22 of the Dealer Agreement that did not exist in its original format; (2) it did not comply with the Regulation by setting out the reasons for non-renewal; and (3) it did not give Chesterman an opportunity to address the concerns raised. In my view, all of these findings are errors of law and cannot stand. In this regard, I part company with the views of my two colleagues who would characterize these issues as questions of mixed fact and law.

Reliance on a contractual provision that "did not exist"

[137] With respect to the first ground, the Tribunal found that the September 30 letter from CNH could not be considered a written refusal to approve Chesterman's deemed notice to renew,

but rather an attempt to exercise a right under paragraph 22 of the Dealer Agreement "that no longer existed." This is an error of law. The Tribunal had already determined that it would not treat paragraph 22 of the Agreement as void for non-compliance with the Regulation. Having made that determination, the Tribunal must act judicially and treat each of the parties to the Agreement in an even-handed manner.

[138] The Tribunal held that the Agreement would continue to automatically renew, even though the paragraph that contained the renewal clause was inconsistent with the Regulation. The Tribunal also held that the requirement under the Regulation for the dealer to deliver a written notice of intent to renew, thereby triggering the obligations of the distributor and time limits for performance under the Regulation, was satisfied by the mere existence of paragraph 22 without the dealer having to do anything further. In effect, the Tribunal deemed Chesterman to have delivered a written request to renew, by virtue of paragraph 22 of the Agreement. These are interpretations that are generous to the dealer and I have no difficulty with that.

[139] However, the Tribunal cannot find that paragraph 22 survives and operates to the benefit of the dealer with respect to automatic renewal and written notice of renewal, and at the same time find that that paragraph 22 no longer exists as far as the distributor is concerned. In fact, paragraph 22 does continue to exist, although now interpreted by the Tribunal in a manner consistent with the Regulation. The Tribunal itself ruled this to be the case. Both the Regulation and the rewritten paragraph 22 provide the distributor with a right to reject the dealer's written request to renew. To hold otherwise, is an incorrect interpretation of the rights and obligations flowing to the parties under the Regulation.

[140] The Tribunal fails to address this very concern which was raised by the Divisional Court in its oral Reasons delivered on March 12, 2012 by Aston J., as follows (at p.4):

> In addition, we are of the view that the tribunal should have the opportunity to consider issues not expressly addressed in its reasons. The tribunal's understanding of the agreement between counsel may have obviated the tribunal's need to address the appellant's contentions on appeal that, first, the interplay between the new regulation and paragraph 22 of the dealer agreement cannot be inconsistent, that is to say void and unenforceable for the appellant [CNH], but valid and enforceable for the respondent [Chesterman]; and secondly, whether the regulation has retrospective or retroactive effect.
>
> We are not directing the tribunal to consider these issues, but rather affording the tribunal an opportunity to do so if it chooses.

[141] As noted by Aston J. on the last occasion in the Divisional Court, this was an opportunity for the Tribunal to consider this issue, not a direction. Nevertheless, the issue raised is a serious one and the Tribunal's failure to address it is quite problematic. The Tribunal has adopted an approach that is inconsistent, in which the Agreement means one thing for one party, and something quite different for the other party. For example, the Tribunal held that: the CNH letter

"sought to engage a non-renewal right that CNH no longer enjoyed" (p. 32); that the letter "communicated a non-renewal right that had become void" (p. 33); and (at p. 29) that the letter "was not written notice of refusing to approve [Chesterman's] renewal request," but rather, notice "that sought to exercise a right from paragraph 22 of the Dealer Agreement that no longer existed in its original format." An impartial decision-maker cannot re-write an agreement to generously extend the rights of one of its provisions for the benefit of one party, and then declare that same paragraph void as against the other party. This is an irrational interpretation that cannot be accepted.

[142] Under the modified paragraph 22, Chesterman was deemed to have delivered its written notice to renew and the Agreement would then automatically renew unless: (1) CNH gave "written notice to the Dealer; (2) at least forty-five (45) days prior to the end of the . . . extension term; (3) setting out [CNH's] non-renewal reasons." These are the very words that the Tribunal itself wrote into the Agreement.[21] In this case: (1) CNH gave written notice; (2) it gave that notice on September 30, 2006, substantially more than the 45-day notice period before December 31, 2006; and (3) in that letter, CNH stated, "The decision not to renew is based upon serious breaches of the [Dealer Agreement]".

[143] It is beyond question that the September 30, 2006 notice from CNH falls squarely within the notice of non-renewal by the distributor under the Agreement as modified by the Tribunal, and within the meaning of Regulation 123, which requires the distributor to "notify the dealer in writing of the reasons for the refusal." In my view, the Tribunal's conclusion to the contrary is wrong in law. This is not a question of contractual interpretation of concern only to the parties themselves. The intention of the parties and the surrounding circumstances in which they entered into their original contract are irrelevant. This is a statutory term that was incorporated into the contract between the parties by operation of law, and one that is extraneous to whatever may have been in the minds of the parties when they first entered into their contract. The terms of the Regulation, and their interpretation, apply to every agreement between farm equipment dealers and distributors and/or manufacturers in Ontario. As such, it has a broad application that goes well beyond the interests of these two parties. Further, even if one considers the Agreement itself, the Tribunal's interpretation in this case is not merely an interpretation of the contract between the parties, but rather of the contract as re-written by the Tribunal to incorporate the requirements of the Regulation. This was a standard form agreement imposed by the distributor, and the Tribunal itself found that 50% of the dealers in Ontario were operating under agreements with similar auto-renewal clauses. As such, even if regarded as a question of contractual interpretation, the issue is one of law rather than mixed fact and law because it establishes a legal principle affecting the rights of all dealers and distributors, rather than being of limited application to anyone beyond the parties. Applying the rationale expressed by the Supreme

[21] Reasons of the Tribunal dated March 24, 2014, at p.25

Court of Canada in *Southam* and *Sattka*, this is a question of law, not one of mixed fact and law. To the extent there is a factual context, it is easily extricable from the general legal principle, within the Supreme Court's reasoning in *Housen*.

Reasons for non-renewal

[144] The second reason given by the Tribunal for finding CNH's notice to be invalid was that the notice failed to properly set out the reasons for the refusal to renew. In its notice, CNH stated that the reason for the non-renewal was repeated breaches of the Dealer Agreement. It set out, in full, the paragraph of the Dealer Agreement alleged to be breached, dealing with maintaining market share. It then set out a grid showing the performance of Chesterman with respect to four product categories and how it had failed to meet the contractual requirements for the years 2003, 2004, 2005 and the year to date (up to July of 2006). Finally, it stated that the Dealer Agreement would not be renewed because of "these long-standing and continued breaches."

[145] The Tribunal found the notice to be invalid because Mr. Mackow, who testified for CNH at the hearing, gave four "other" reasons for termination, being: poor high-power tractor sales performance; poor hay and forage equipment sales performance; declining total revenue; and a lack of trained salespeople. The Tribunal held that because not all of these reasons were in the September 30, 2006 notice, the notice was invalid. That is a conclusion that is so irrational and without foundation on the evidence as to amount to an error of law. Poor high-tractor sales and poor hay and forage equipment sales are quite obviously examples of the failure to meet the market share targets. Likewise, declining total revenue is an offshoot of declining sales and declining performance in meeting market share. The lack of trained salespeople might be an explanation for that decline, or not. It is irrelevant. This is not a situation in which the distributor gave one reason in writing, but where the reasons given were a subterfuge for the real reasons for termination. All of the reasons relate to the poor performance of Chesterman in selling CNH's products, which performance fell far below the targets it was required to meet in its Dealer Agreement. A conclusion that is made arbitrarily, in the absence of any absence whatsoever to support it, is an error of law.

[146] In any event, the Tribunal erred in law by interpreting the Agreement and/or the Regulations as requiring the distributor to state every single reason it could think of for not renewing the Agreement. That is not a requirement. The distributor is required to state its reasons. Those are the only reasons the dealer is required to address. If the distributor has other reasons, but fails to state them, the distributor will be without recourse if the dealer is able to address the concerns raised in the notice. It may also be the case that if the dealer states reasons that turn out to be wrong (which is not the case here), the dealer will not be able to rely on additional reasons not stated as grounds for not renewing (also not the case here). However, by requiring a distributor to set out 100% of its reasons for not continuing an agreement, in default of which its notice would be invalid, the Tribunal gave an interpretation to the Agreement and to the Regulation that neither can bear as a question of law. Further, it based its decision of invalidity on a wholly irrelevant factor, which also constitutes an error of law.

[147] Again, this is a question of law as to the content required under the Regulation for a refusal to renew. For the reasons I stated above, the ruling that a distributor's refusal will be invalid if the distributor fails to provide a comprehensive list of every single one of its reasons, is one that will apply to every distributor giving such a notice under the Regulations. It is a matter of general principle that will have broad application for all distributor/dealer agreements throughout Ontario. Based on the reasoning of the Supreme Court in *Southam* and *Sattka*, this is a question of law and therefore subject to review by this Court.

Opportunity to address concerns

[148] Finally, the Tribunal held that the CNH notice was invalid because it failed to give Chesterman an opportunity to address the concerns raised. The Regulation requires the distributor to give the dealer 45 days' notice of the reasons for refusal, following which the dealer is allowed 15 days to address the underlying concerns set out in the notice. Under paragraph 22 of the Agreement, as modified by the Tribunal to conform to the Regulation, CNH was required to give written notice at least 45 days prior to December 31, whereupon the Chesterman would have 15 days to address the concerns raised. The Tribunal accepted that it was not incumbent on CNH to specifically advise Chesterman of its right to address the concerns raised. I agree. The period of notice given by CNH on September 30, 2006 was twice as long as was required under the Agreement or the Regulation. Notwithstanding that, the evidence is quite clear, Chesterman did absolutely nothing to attempt to address the issue raised by CNH. Under the terms of the Agreement and the Regulation, in the absence of a response by the dealer, the distributor may refuse the renewal. That, in my opinion, is the end of the analysis.

[149] The Tribunal, however, held that any attempt by Chesterman to address the concerns would be "academic" because CNH had already decided that no cure would be effective. That finding is made without any evidence whatsoever to support it and is nothing more than speculation and conjecture. As such it is an error of law.

[150] It can likely be assumed that in any situation in which a distributor elects not to renew a relationship with a dealer because of performance concerns, it is because the distributor has formed the view that this is the appropriate course of action, rather than reviewing options to address the performance concerns. The fact that CNH may have held such a view prior to hearing any proposal for remedying the problems from Chesterman is irrelevant. After the concerns are set out, the onus is on Chesterman to address them in some manner, *e.g.* by disputing that the concerns are accurate; by seeking an extension of time to gradually build up the business; by committing to increased advertising or sales personnel; or by presenting a business plan to demonstrate how sales can be improved. If Chesterman had done something of this nature, the onus would be on CNH to demonstrate why refusing to renew was nevertheless reasonable. But Chesterman did nothing. The Tribunal erred in law by holding there was no requirement on Chesterman to abide by the terms of the Agreement and the Regulation based on the Tribunal's subjective, looking-into-the-future, and wholly speculative view that no matter what Chesterman proposed, CNH would refuse. No such conclusion or view was communicated by CNH to Chesterman. CNH merely delivered the notice and, hearing nothing from

Chesterman, communicated nothing further. That was its right under the Regulation and the Agreement. The Tribunal erred in law by not recognizing the rights of CNH under the scheme.

(iv) Reasonableness of Refusing to Renew

[151] In its initial decision dated March 11, 2011, the Tribunal held, "Debate over what [Chesterman] could or could not have achieved in the prescribed period is academic since CNH failed to comply with the *Regulation."* Except for the fact that CNH did comply with the Regulation, that was a reasonable position to take. Moreover, the same reasoning applies to the analysis of whether CNH's refusal to renew was reasonable. Debate over whether CNH should or should not have proceeded with the non-renewal in light of Chesterman's response is academic since Chesterman failed to comply with the Regulation by addressing the concerns raised. Moreover, Chesterman did not present any evidence at the hearing as to how it would have been able to address any of the concerns raised by CNH. The Tribunal found this to be the case, and found that Chesterman had consistently failed to meet the sales targets required in the Agreement. However, notwithstanding Chesterman's failure to address the concerns raised at any time after receipt of the notice, and notwithstanding Chesterman's failure to present any evidence at the hearing as to how it could have addressed the concerns raised if it had attempted to so do, the Tribunal went on to consider whether CNH had acted reasonably.

[152] In its earlier March 11, 2011 decision, and repeated essentially verbatim in its March 24, 2014 decision, the Tribunal rejected arguments by Chesterman that the contract and/or the non-renewal by CNH were either unconscionable or in bad faith. The Tribunal noted that this was a standard-form Agreement, but that the parties had worked within it for two decades in a mutually beneficial relationship, such that it could not be said to be unconscionable. The Tribunal also rejected the arguments that CNH's decision to terminate had been made in bad faith. Although Chesterman argued before the Tribunal that the data relied upon by CNH was "suspect" or "wrong," the Tribunal held that there was no evidence to support the argument that these numbers were wrong. The Tribunal rejected Chesterman's argument that CNH's decision was based on some personal dislike or animosity between Dave Chesterman and CNH's sales manager, Real Prefontaine, and held that there was no evidence that this friction "had anything to do with" the decision not to renew. That decision, it held, was made by Mr. Mackow who was completely unaware of the friction between the two. The Tribunal was satisfied that CNH's decision was made based on market data and Chesterman's poor performance measured against that data, as provided for in the Agreement. The Tribunal held (at p. 14-15):

> The Tribunal does not find that CNH's reliance on market data from AEM [Association of Equipment Manufacturers] to be in "bad faith" as a basis for its decision not to renew the Dealer Agreement. The parties governed their dealings for almost two decades relying on the AEM data. While questions about the reliability of the data have been raised, the question for the Tribunal is not whether CNH's conclusion that [Chesterman] was performing poorly can be

> objectively proven correct today. The question is whether when that decision was taken did CNH have a good faith belief that [Chesterman] was performing poorly. The evidence from Mackow was he saw [Chesterman's] performance had been declining when he became Market Representation Manager in the spring of 2006. He testified that when the July 2006 results confirmed his view of the decline, the non-renewal decision was finalized and implemented. As previously noted, [Chesterman] did not challenge the AEM data about its own sales in units or revenue. That data reflected that for the years 2003, 2004, 2005 and the first six months of 2006, [Chesterman's] tractor sales, in units, had declined from 16 to 10 to 9 to 5. During that same period for hay and forage equipment, its unit sales had declined from 8 to 4 to 4 to 1. Chesterman's sales revenue of CNH products over that same period declined from $1,595 million to $1,317 million, to $901,000 to $469,000.
>
> The Tribunal cannot find any "bad faith" in these circumstances.

[153] I see no error of law in those findings. The conclusion that there was no bad faith and no unconscionability is amply grounded in the factual findings of the Tribunal.

[154] Nevertheless, in its 2011 decision, the Tribunal found, without much elaboration, that CNH's decision not to renew was unreasonable. One of the questions referred back to the Tribunal by the Divisional Court in its October 6, 2011 Order was whether reasonableness, unconscionability and bad faith were mutually exclusive, or whether a finding of one, leads to a finding of the others. The Tribunal addressed this issue at pp. 31-32 of its Reasons, holding that "but for" the Regulation, CNH's non-renewal was not unreasonable because it was authorized under the terms of the Dealer Agreement, and in particular paragraph 22 thereof. However, the Tribunal reasoned that the Regulation brought the concept of reasonableness back into play because it took away CNH's absolute right to not renew and stipulated that CNH could not withhold its consent to a renewal "unreasonably." The Tribunal held (at p. 32) that when the CNH decision to withhold renewal approval was examined, the Tribunal must ask whether the decision was "reasonable," and that "this statutory standard of reasonableness incorporated the common law reasonableness standard."

[155] The Tribunal found that it was therefore not inconsistent to "make findings of no unconscionability and no bad faith but still make a finding of unreasonableness." I agree that is a correct statement of the applicable legal principles.

[156] Unfortunately, when the Tribunal turned to consider the issue of whether CNH acted unreasonably in refusing to renew, it based its decision largely on its view that the September 30, 2006 notice was invalid because paragraph 22 of the Agreement was void, that the letter did not set out all of the reasons for non-renewal and that Chesterman was not given an opportunity to address CNH's concerns. The Tribunal concluded (at p. 34):

> Therefore, if the Tribunal notionally considered the September 30th, 2006 letter as CNH's required written response under the *Regulation*, we find that CNH failed to fully explain its non-renewal decision, and it also failed to give [Chesterman] an opportunity to address its concerns. In this hypothetical and the circumstances, we would therefore find CNH to have unreasonably withheld renewal approval and to have breached the *Regulation*.

[157] I agree that if there had been a failure by CNH to comply with the terms of the Regulation in its notice refusing renewal, that would render its decision unreasonable and it would be in breach of the Regulation, and in breach of the Dealer Agreement as those terms are incorporated into the Agreement. However, CNH was in full compliance with the Regulation; it was Chesterman that did not comply with the Regulation. In those circumstances, and in the absence of any finding that CNH did not have valid grounds to refuse to renew, there is no basis for concluding, in law, that CNH acted unreasonably.

[158] By basing its conclusion on irrelevant factors, and incorrect legal principles, the Tribunal erred in law. Further, as previously stated, these are principles of general application because these were statutory terms, not contractual terms freely negotiated by the parties. These are principles of broad application and are therefore more in the nature of questions of law.

[159] I do note, however, that the Tribunal listed a number of factors that it considered could be part of a reasonableness analysis. A careful reading of the decision shows that the Tribunal did not actually take any of those factors into account in its analysis of reasonableness. I consider that to be legally correct in light of the lack of any response by Chesterman. However, if Chesterman had made any kind of proposal to address the concerns of CNH, and if CNH had then refused to renew, it would have been relevant to look at the reasonableness of CNH's refusal in light of Chesterman's proposal, along with other factors including a number of factors listed (but not applied) by the Tribunal at pp. 32-33, notably:

- The parties had a 19-year business relationship.
- Chesterman's premises were subject to inspections and grading by CNH.
- Chesterman's business performance was tracked and graded by CNH.
- Chesterman received CNH's President's Prestige Award commending Chesterman's business premises standards for 2004-05 and 2005-06.
- Between 2003-2006, CNH sales and services accounted for the majority of Chesterman's business.
- CNH did not issue Chesterman any written warnings its dealership status was in jeopardy.

[160] Had the circumstances been appropriate to conduct such an analysis of reasonableness, and if the Tribunal had considered relevant factors such as these, I would agree that this was a question of mixed law and fact. However, the threshold question (the failure of Chesterman to provide any response to CNH's valid stated grounds for refusing to renew) is an extricable question of law. Further, the failure to consider relevant factors and taking into account irrelevant factors are both errors of law. I therefore do not agree that this finding by the Tribunal is a question of mixed fact and law. It is a legal error and subject to appeal before this Court.

(v) Breach of Contract and Damages

[161] The Tribunal committed fundamental legal errors in reaching its conclusion that CNH breached the contract. For the reasons I have stated above, CNH did not breach the contract or the Regulations. I would, therefore, have considered it was not liable for any damages. From my perspective, that would have been sufficient to dispose of this appeal. However, my colleagues disagree that these are errors of law subject to review by this Court and are of the view that the Tribunal's conclusion of breach of contract must stand. I will therefore review the various other grounds of appeal raised by the parties.

Damages for Obsolete Items

[162] The Tribunal awarded damages of approximately $80,000 for the various manuals and specialized tools and equipment which Chesterman was required to purchase over the years and which are now useless to Chesterman. CNH submits that the Tribunal erred in law by awarding damages for these items. I agree.

[163] The Tribunal correctly held (at p. 40) that, unlike farm implements and parts, the Act does not require the distributor to repurchase tools and manuals. The Tribunal, however, went on to hold that it was "reasonably foreseeable" that once Chesterman ceased to be a CNH dealer, the special tools and manuals it had purchased from CNH and which were unique and specific to CNH products, would be obsolete. The Tribunal reasoned further that it would therefore be "reasonably foreseeable" to CNH that Chesterman would suffer a loss in respect of those tools and manuals. The Tribunal therefore held that Chesterman was entitled to damages in respect of the obsolete assets and accepted Chesterman's evidence as to their value, based on estimates derived from 2006 pricing or internet information.

[164] The Tribunal erred in law by applying concepts of "reasonable foreseeability" rather than looking to the terms of the Dealer Agreement itself. As such, it failed to consider a relevant factor (the terms of the Agreement) and took into account an irrelevant factor (foreseeability). Both, as confirmed in *Sattva*, are errors of law.

[165] Section 25 of the Dealer Agreement specifies the property that CNH will repurchase upon expiration or termination of the Agreement. The Agreement specifies that CNH will only repurchase product, which is a defined term under the Agreement, and which does not include

tools and manuals. Indeed, such items are specifically excluded under paragraph 25 of the Agreement.

[166] Further, there was expert evidence before the Tribunal that the cost of manuals and tools were expensed by Chesterman as a cost of doing business and not recorded as an asset in its books. Accordingly, those expenses would have been written off against income. In awarding damages for these items in addition to lost profit, the Tribunal improperly permitted double-recovery. This also, is an error in principle on a question of law.

[167] In my view, there was no basis in law for awarding any damages for these items. I would have set aside the award for obsolete items.

Cross-Appeal: Loss of Profits

[168] Chesterman cross-appealed the Tribunal's award with respect to loss of profits. Chesterman submits that the Tribunal erred in basing its loss of profits award on the theory that the contract could be terminated upon reasonable notice, which it found in the circumstances to be two years. There is no error of law in that finding. Chesterman was not entitled to an award of damages based on the theory that this contract would continue into perpetuity. That is particularly the case given that the Tribunal found that the non-renewal was based on a breach of a term of the contract, the particulars of which were not refuted.

[169] The Tribunal made findings of fact as to the appropriate model for damages in the circumstances and on the expert evidence it found was best supported by the evidence. The Tribunal made express findings of fact as to the unreliability of the basis for Chesterman's expert's calculation of the losses.

[170] The quantum of damages is a question of fact, not reviewable by this Court. There is no basis for this Court to intervene.

Interest

[171] The Tribunal awarded interest on the damages, calculated pursuant to the *Courts of Justice Act*. CNH argues that the Tribunal has no jurisdiction to award interest.

[172] The Tribunal reasoned that the disputes it is called upon to adjudicate would otherwise be determined in the courts and the parties should be entitled to recover from the Tribunal what they would obtain in the courts, which would include an award of interest on any damages.

[173] I agree. Section 33 of the Act stipulates that the rights, duties and obligations under the Act "are in addition to the rights, duties and remedies under any other Act and the common law." The parties before the Tribunal in this case were engaged in a dispute as to the application of the Act and Regulations. That dispute was referred to the Tribunal which is empowered by s.5(6) to "decide the issue that is before it for a hearing." If one of the parties to this dispute would have been entitled to damages at common law, the tribunal is empowered to award those damages. At

common law, and before the courts under the *Courts of Justice* Act, the parties would be entitled to interest on any award of damages, in the discretion of the Court. In those circumstances, I see no jurisdictional obstacle to the Tribunal awarding interest on any damage award it might make. That would simply be one aspect of compensating a party for what it has lost; a matter that is squarely within the Tribunal's jurisdiction.

[174] Although the Court of Appeal's decision in *Billes v. Parkin Architects Planners*[22] dealt with the power of arbitrators to award interest, the same general principles apply. The Court of Appeal held that although no specific clause empowered the arbitrator to award interest, such jurisdiction flowed from the power to award damages. The Court endorsed the following statement from the Alberta Court of Appeal:

> If the matter is at large and to be resolved as a question of policy, I would strongly favour permitting arbitrators to award interest. I can think of no valid reason why arbitrators deciding a claim should be powerless to grant a remedy that a judge hearing the same claim would be bound to grant. The claimant before the arbitrator would be severely prejudiced in this day of high interest rates. I can think of no good reason why the arbitrator should not be able to give him a complete remedy. An award in a commercial case that does not take into account the cost of money will not do justice between the parties because it will have disregarded a major cost of most enterprises.

[175] In my view, the same reasoning applies to the Tribunal. A specific statutory grant of the power to award interest is not required in order to vest jurisdiction in the Tribunal to award interest on damages awards designed to compensate a party for a loss.

[176] CNH also objected to the rate of interest applied by the Tribunal, which was 6% throughout notwithstanding considerable fluctuations in the *Courts of Justice* rate since 2006. If the Tribunal is attempting to track what a court would award in interest, it may wish to consider that courts will typically take the average interest rate in those circumstances. However, the Tribunal's choice of interest rate is not an error of law; it is an exercise of discretion on a question of fact. I would not intervene.

I. ANALYSIS: COSTS DECISION

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[22] *Billes v. Parkin Architects Planners* (1983), 40 O.R. (2d) 525 (C.A.), citing *Westcoast Transmission Co. Ltd. v. Majestic Wiley Contractors Ltd.* (1982), 31 B.C.L.R. 174 (Bouck J.), affirmed June 2, 1982 (unreported [now reported, 139 D.L.R. (3d) 97, [1982] 6 W.W.R. 149, 38 B.C.L.R. 310]) at W.W.R. 154.

[177] The Tribunal invited the parties to provide written submissions as to costs. Chesterman sought costs in the amount of $639,340. CNH opposed any costs award, but submitted that if costs were to be awarded, the Tribunal should adopt an approach similar to that applied by an Assessment Officer under the *Rules of Civil Procedure*.

[178] CNH submits that the Tribunal erred in law and exceeded its jurisdiction in awarding costs in this case. I agree.

[179] The Tribunal correctly held that s. 17.1 of the *Statutory Powers Procedure Act* (*SPPA*)[23] sets out two statutory prerequisites to the Tribunal's jurisdiction to award costs. That section provides:

> **Costs**
>
> 17.1 (1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party's costs in a proceeding.
>
> **Exception**
>
> (2) A tribunal shall not make an order to pay costs under this section unless,
>
> (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
>
> (b) the tribunal has made rules under subsection (4).
>
> **Amount of costs**
>
> (3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4).
>
> **Rules**
>
> (4) A tribunal may make rules with respect to,
>
> (a) the ordering of costs;

[23] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22

> (b) the circumstances in which costs may be ordered; and
>
> (c) the amount of costs or the manner in which the amount of costs is to be determined.

[180] One precondition[24] is that before a Tribunal can order costs, it must have enacted Rules with respect to costs, and it must award those costs only in accordance with those Rules. The Tribunal does have Rules governing awards of costs in proceedings before it, thus satisfying that precondition.

[181] The second precondition[25] is that the conduct of the party has been "unreasonable, frivolous or vexatious or a party has acted in bad faith."

[182] This same language is tracked in the Tribunal's own Rules. Rule 28.01 provides:

> Where a party believes that another party has acted clearly unreasonably, frivolously, vexatiously or in bad faith considering all of the circumstances, it may ask for an award of costs.

[183] Under the heading "Circumstances in which Costs Order May be Made", Rule 28.04 provides as follows:

> 28.04 Clearly unreasonable, frivolous, vexatious or bad faith conduct can include, but is not limited, to:
>
> a. Failing to attend a hearing event or to sending a representative when properly given notice, without contacting the Tribunal;
> b. Failing to give notice or adequate explanation or lack of co-operation during pre-hearing proceedings, changing a position without notice, or introducing an issue or evidence not previously mentioned;
> c. Failing to act in a timely manner or to comply with a procedural order or direction of the Tribunal where the result was undue prejudice or delay;
> d. Conduct necessitating unnecessary adjournments or delays or failing to prepare adequately for hearing events;
> e. Failing to present evidence, continuing to deal with issues, asking questions or taking steps that the Tribunal has determined to be improper;
> f. Failing to make reasonable efforts to combine submissions with parties of similar interest;
> g. Acting disrespectfully or maligning the character of another party; and

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[24] *SPPA*, ss. 17.1(2)(b) and 4
[25] *SPPA*, s. 17.1(2)(a)

> h. Knowingly presenting false or misleading evidence. The Tribunal will consider the seriousness of the misconduct. If a party requesting costs has also conducted itself in an unreasonable manner, the Tribunal may decide to reduce the amount awarded. (The Tribunal will not consider factors arising out of a mediation or settlement conference except where, for example, it finds that a request for change to a settlement is unreasonable.)

[184] Ordinarily, courts will only impose extreme costs sanctions based on the conduct of the party in the litigation. A similar interpretation applies to the type of conduct that will attract a costs award under s. 17.1 of the *SPPA* and, indeed, under the Tribunal's own Rules. It is apparent from the list of circumstances under Rule 28.04 that the behavior contemplated is conduct within the hearing itself, not conduct in relation to the initial dispute between the parties. This is reinforced by the Tribunal's own commentary as to its Rules, which is published on its website, as follows:

> A cost order may be made if a party requests it, if one party has in the Tribunal's opinion acted inappropriately, as in Rule 28.04. Such orders and the amount awarded are to discourage conduct that wastes a great deal of the Tribunal's and parties' time as well as other resources. Note that for matters under the Drainage Act, costs are awarded only as provided in that Act.
>
> An order for costs is very rare. Recovery of costs is not standard as in court proceedings. It is only where the Tribunal finds that a party wrongly brought the appeal or participated unacceptably in preparation or hearing events, that an award of cost will be made.

[185] Although the website commentary does not have binding effect in the same manner as the Rules themselves, the commentary is fully consistent with the Rules and with s. 17.1(2(a) of the *SPPA*. Decisions of the Agricultural, Food, and Rural Affairs Appeal Tribunal in other cases have been to the same effect.[26]

[186] The Tribunal in this case did not adhere to the restrictions set out in s. 17.1(2)(a) of the *SPPA*, or its own Rules, or its own published commentary on those Rules, or its own case authority. In awarding costs against CNH, the Tribunal relied upon its previous finding that CNH's conduct in ending the Dealer Agreement with Chesterman was "unreasonable", which it said satisfied the second criteria. That is a legal error. Conduct that relates to the subject matter of the proceeding (*i.e.* breach of contract) is not a basis for an award of costs under the Tribunal's Rules or s. 17.1 of the *SPPA*.

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[26] *LaGantoise Inc. v. Dairy Farmers of Ontario*, 2012 ONAFRAAT 21, p.2; *HSBB Drain (RE)*, 2010 ONAFRATT 26; *Short and No.2A Drain (RE)*, 2011 ONAFRAAT 37; *OQRO v. DFO*, 2009 ONAFRAAT 27

[187] The Tribunal also relied on s. 33 of the Act which preserves common law rights and remedies as authority to apply the "common law principle of costs following the event." There is no such principle at common law. Courts order costs under statutory power to do so and have developed jurisprudence to the effect that the successful party will normally have its costs. That does not in any way confer power on a Tribunal to do the same. The Tribunal, as a creature of statute, has only the jurisdiction specifically conferred upon it. Its jurisdiction to award costs is restricted by statute and by its own Rules.

[188] The Tribunal pointed to the fact that Chesterman had claimed costs in its pleadings before the tribunal and noted that if the parties had litigated this matter in the courts they would have expected to pay costs. The Tribunal therefore held that it was "unreasonable" for CNH to expect that CNH would be entitled to recover its costs before the Tribunal. First of all, the reasonable expectation of the parties does not confer jurisdiction where there is none. Secondly, what would be in the reasonable expectation of the parties is that the Tribunal would adhere to its own Rules, particularly given its published commentary on its own website, along with those Rules, explaining to the public that "an order for costs is very rare" and that "recovery of costs is not standard as in court proceedings."

[189] The Tribunal pointed to only two factors that could be seen to be related to the conduct of the proceedings by CNH, those being CNH's change in position with respect to whether it conceded that the auto-renewal clause could be treated as the written notice of intent to renew required by Regulation 123, and the argument about retrospective or retroactive effect. The latter point is a legal issue that arises from the legislation and the factual record. Even if not raised by the parties it should have been addressed by the Tribunal, and was addressed by the Divisional Court. Indeed, in the appeal before this Panel, we required the parties to file further facta on this issue. Regardless of the change in position or the retrospective/retroactive issue, the Divisional Court in 2011 would have returned the matter to the Tribunal for further consideration on how Regulation 123 interacted with the Dealer Agreement. The cost of the second hearing cannot be laid entirely at the feet of CNH.

[190] The Tribunal was clearly frustrated by the degree to which a proceeding that was meant to be inexpensive and expeditious became as complex as commercial litigation in the courts. The Tribunal pointed to the fact that there was a claim for damages of $1 million, hundreds of documents, multiple expert witnesses, multiple lawyers, and a hearing that involved 17 hearing days spread over three years. All of that is true, and obviously makes it a rare case for the Tribunal. However, the fact that it is a rare case does not mean that costs are therefore warranted against CNH. CNH did not advance a $1 million damages claim. Chesterman did that, and only recovered a small fraction of that amount. Chesterman had five lawyers working on the case and was financed throughout by its association, CEEDA, as this was regarded as a test case. Again, that cannot be laid at the feet of CNH.

[191] The Tribunal considered whether this was the kind of case in which substantial indemnity costs would have been warranted against CNH if this had been a court proceeding, and held that only partial indemnity costs would have been appropriate. For those very same reasons, the

Tribunal ought to have found that there was no conduct of a nature to attract a costs award at all, or if there was one, it would only have been related to any additional costs resulting from CNH's change in position on the effect of the auto-renewal, which was minimal.

[192] Finally, in my view, proportionality is always a relevant factor in determining costs. A failure to take into account is an error of law.

[193] Given these errors of law, the costs award cannot stand.

MOLLOY J.

Released: March 7, 2016

CITATION: Chesterman Farm Equipment Inc. v. CNH Canada Ltd., 2016 ONSC 698
DIVISIONAL COURT FILE NO.: 14-0033-00
DATE: 20160307

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MOLLOY, HACKLAND and HAMBLY JJ.

BETWEEN:

CHESTERMAN FARM EQUIPMENT INC.

Applicant /Respondent on Appeal)

– and –

CNH CANADA LTD.

Respondent/Appellant

REASONS FOR JUDGMENT

Hambly and Hackland JJ.,

Molloy J. (dissenting in part)

Divisional Court

Released: March 7, 2016

TAB 4

Gustavson Drilling (1964) Limited
Appellant;

and

The Minister of National Revenue
Respondent.

1974: November 1, 5; 1975: December 4.

Present: Martland, Judson, Pigeon, Dickson and de Grandpré JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation—Income tax—Oil companies—Deductions—Drilling and exploration expenses—Transferability of right to deduct to successor corporation—Income Tax Act, R.S.C. 1952, c. 148, as amended, s. 83A(8a), now 1970-71-72, (Can.) c. 63, s. 66(6).

Since 1949 the exploration for petroleum and natural gas has been encouraged by the provision in the *Income Tax Act*, R.S.C. 1952, c. 148 as amended 1970-71-72, c. 63, that oil companies could deduct drilling and exploration expenses from income earned in subsequent years. In 1956 the right was extended to successor corporations by legislation which provided that an oil company which acquired all or substantially all of the property of another oil company could deduct drilling and exploration expenses incurred by the predecessor corporation. The acquisition had however to be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor on the winding up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed. The appellant oil company incurred drilling and exploration expenses in excess of its income prior to 1960 when its parent company acquired substantially all of its property in consideration of the cancellation of a debt due. Entitlement to claim the undeducted drilling and exploration expenses did not accrue to the parent company as the transaction was not carried out as required by the 1956 Act. The appellant remained inactive until 1964 when its shares were acquired by another corporation following the liquidation of its previous parent company. After a change of name it recommenced business with newly acquired assets, none of which had been used or owned by it prior to June 1964. It sought to deduct the accumulated drilling and exploration expenses for the ensuing taxation years. The Minister re-assessed and disallowed the deductions. The appellant successfully appealed to the

Gustavson Drilling (1964) Limited
Appelante;

et

Le ministre du Revenu national *Intimé.*

1974: le 1er et 5 novembre; 1975: le 4 décembre.

Présents: Les juges Martland, Judson, Pigeon, Dickson et de Grandpré.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Revenu—Impôt sur le revenu—Compagnies pétrolières—Déductions—Dépenses d'exploration et de forage—Transmissibilité du droit de déduire ces dépenses à la compagnie remplaçante—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, avec modifications, art. 83A(8a), maintenant 1970-71-72 (Can.), c. 63, art. 66(6).

Depuis 1949, la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, modifié par 1970-71-72, c. 63, encourage la recherche du pétrole et du gaz naturel en autorisant les compagnies pétrolières à déduire les dépenses de forage et d'exploration du revenu des années subséquentes. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi prévoyant qu'une compagnie pétrolière qui acquérait tous ou presque tous les biens d'une autre compagnie pétrolière pouvait déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Cependant, il fallait que l'acquisition résulte a) d'un échange d'actions du capital social de la remplaçante, ou b) de la distribution des biens à la compagnie remplaçante lors de la liquidation de la compagnie remplacée, postérieurement à l'achat des actions de la compagnie remplacée, par la compagnie remplaçante, moyennant les actions de cette dernière. En 1962, on a retiré ces conditions. La compagnie pétrolière appelante a engagé des dépenses de forage et d'exploration d'un montant supérieur à son revenu avant 1960, année durant laquelle la compagnie-mère a acquis presque tous ses biens en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. La compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que l'opération ne s'est pas faite selon les conditions énoncées dans la Loi de 1956. L'appelante est restée inactive jusqu'en 1964, date à laquelle une autre compagnie a acheté, à la suite de la liquidation de la compagnie-mère, l'ensemble de ses actions. Après un changement de nom, l'appelante a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été pos-

Tax Appeal Board but on a Special Case stated by consent, the Minister was successful in the Federal Court before Cattanach J. and on appeal.

Held (Pigeon and de Grandpré JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Dickson JJ.: The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. On a literal construction of the legislation the appellant was in the category of a predecessor company and had thereby lost the right to deduct. As the language of the statute was unambiguous and clear, there was no need to have recourse to rules of construction to establish legislative intent. It could not be said that the 1962 legislation was retrospective or that any vested right acquired by the appellant by the repealed paragraphs was affected by their repeal.

Per Pigeon and de Grandpré JJ. *dissenting*: The legislative change effected in 1962 was not an alteration in the scheme of deductions for drilling and exploration expenses. It was a modification in the transferability of the entitlement to those deductions. While the rule against retrospective operation of statutes is no more than a rule of construction which operates more or less strongly according to the nature of the enactment, it operates nowhere more strongly than when any other construction would result in altering the effect of contracts previously entered into. The effect of the 1962 change was to facilitate the transfer of the right to deductions not to alter the result of past contracts so as to effect a forfeiture of the rights of oil companies that had previously transferred their properties under conditions that did not involve the transfer of the valuable right of entitlement to deduct to the transferee.

[*Assessment Commissioner of The Corporation of the Village of Stouffville v. Mennonite Home Association*, [1973] S.C.R. 189; *Acme Village School District v. Steele-Smith*, [1933] S.C.R. 47; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] S.C.R. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961] C.T.C. 490 (Exch.); *Director of*

sédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu des années subséquentes, l'appelante a cherché à déduire les dépenses accumulées de forage et d'exploration. Le Ministre a établi une nouvelle cotisation et rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante mais, par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé en appel.

Arrêt (les juges Pigeon et de Grandpré étant dissidents): Le pourvoi doit être rejeté.

Les juges Martland, Judson et Dickson: Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Interprétée littéralement, la Loi attribue nettement à l'appelante la qualité de compagnie remplacée; cette dernière perd donc le droit aux déductions. En présence d'un texte de loi clair et précis il n'est pas nécessaire de recourir aux règles d'interprétation pour déterminer quelle était l'intention du législateur. On ne peut soutenir que la Loi de 1962 avait un effet rétroactif ou que l'abrogation des paragraphes en question a eu un effet sur quelque droit acquis par l'appelante sous leur régime.

Les juges Pigeon et de Grandpré, *dissidents*: La modification législative de 1962 n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration. Elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation et sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. L'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire.

[Arrêts mentionnés: *Assessment Commissioner of The Corporation of the Village of Stouffville c. Mennonite Home Association*, [1973] R.C.S. 189; *Acme Village School District c. Steele-Smith*, [1933] R.C.S. 47; *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] R.C.S. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961]

Public Works v. Ho Po Sang, [1961] 2 All E.R. 721 (P.C.); *Hargal Oils Ltd. v. Minister of National Revenue*, [1965] S.C.R. 291 referred to].

APPEAL from a judgment of the Federal Court of Appeal[1] affirming the judgment of Cattanach J. allowing an appeal by way of special case stated from a decision of the Tax Appeal Board allowing an appeal by the appellant from an income tax assessment. Appeal dismissed, Pigeon and de Grandpré JJ. dissenting.

John McDonald, Q.C., F. R. Matthews, Q.C., and *D. C. Nathanson*, for the appellant.

G. W. Ainslie, Q.C., and *L. P. Chambers*, for the respondent.

The judgment of Martland, Judson and Dickson JJ. was delivered by

DICKSON J.—This is an income tax case concerning the right of the appellant Gustavson Drilling (1964) Limited to deduct in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years drilling and exploration expenses incurred by it from 1949 to 1960.

Parliament since 1949 has encouraged the exploration for petroleum and natural gas by permitting corporations "whose principal business is production, refining or marketing of petroleum, petroleum products or natural gas or exploring or drilling for petroleum or natural gas" (hereafter referred to as "oil companies") to deduct their drilling and exploration expenses in computing income for the purpose of the *Income Tax Act*. In 1956 the right was extended to successor corporations by legislation which provided that a corporation whose principal business was exploring and drilling for petroleum or natural gas and which acquired all or substantially all of the property of another corporation in the same type of business could deduct drilling and exploration expenses incurred by the predecessor corporation. In the absence of this legislation neither the successor corporation nor the predecessor corporation could have availed itself of such drilling and exploration

[1] [1972] F.C. 1193.

C.T.C. 490 (Ech.); *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (C.P.); *Hargal Oils Ltd. c. Le ministre du Revenu national*, [1965] R.C.S. 291].

POURVOI interjeté d'un arrêt de la Cour d'appel fédérale[1] confirmant le jugement du juge Cattanach accueillant un appel exposé dans un mémoire spécial à l'encontre d'une décision de la Commission d'appel de l'impôt qui avait accueilli un appel interjeté par l'appelante d'une cotisation à l'impôt sur le revenu. Pourvoi rejeté, le juge Pigeon et de Grandpré étant dissidents.

John McDonald, c.r., F. R. Matthews, c.r., et *D. C. Nathanson*, pour l'appelante.

G. W. Ainslie, c.r., et *L. P. Chambers*, pour l'intimé.

Le jugement des juges Martland, Judson et Dickson a été rendu par

LE JUGE DICKSON—Il s'agit d'une question d'impôt sur le revenu portant sur le droit de l'appelante Gustavson Drilling (1964) Limited de déduire dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, les dépenses de forage et d'exploration qu'elle a faites de 1949 à 1960.

Depuis 1949, le Parlement encourage la recherche du pétrole et de gaz naturel en autorisant les compagnies dont «l'entreprise principale est la production, le raffinage ou la mise en vente du pétrole, des produits du pétrole ou du gaz naturel, ou l'exploration ou le forage en vue de découvrir du pétrole ou du gaz naturel» (ci-après appelées «compagnies pétrolières») à déduire leurs dépenses de forage et d'exploration, dans le calcul de leur revenu aux fins de la *Loi de l'impôt sur le revenu*. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi qui prévoyait qu'une corporation dont l'entreprise principale est l'exploration et le forage en vue de découvrir du pétrole ou du gaz naturel et qui acquiert tous les biens ou sensiblement tous les biens d'une autre corporation dont l'entreprise principale est la même, peut déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. En l'absence de cette loi, ni la

[1] [1972] C.F. 1193.

expenses for tax purposes. The 1956 legislation contained qualifications, however. In order to entitle the successor corporation to the deduction it was imperative that the acquisition of the property of the predecessor by the successor be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor upon the winding-up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed; thereafter the legislation simply provided that every oil company which at any time after 1954 acquired all or substantially all of the property of another oil company could claim a deduction in respect of drilling and exploration expenses incurred by the predecessor company and the predecessor company was denied the right to make any such claim. Within this context the present case arises.

The appellant was incorporated in 1949 under the name of Sharples Oil (Canada) Ltd., as a wholly owned subsidiary of Sharples Oil Corporation, an American corporation, and until 1960 it carried on the business of an oil company in Canada, incurring during that period drilling and exploration expenses of $1,987,547.19 in excess of its income from the production of petroleum and natural gas. On November 30, 1960, the parent company, Sharples Oil Corporation, acquired substantially all of the property of the appellant in consideration for the cancellation of a debt owing to it by the appellant. The parties agree that at this time entitlement to claim the theretofore undeducted drilling and exploration expenses did not accrue to the parent company because the transaction was not carried out in either manner prescribed by the Act.

After disposal of its property the appellant discontinued business and remained inactive until 1964. In June 1964, however, Mikas Oil Co. Ltd. purchased all of the issued and outstanding shares in the capital stock of the appellant from the shareholders of Sharples Oil Corporation following the liquidation of that corporation. The appellant's

corporation remplaçante ni la corporation remplacée n'aurait pu se prévaloir pour des fins fiscales des dépenses de forage et d'exploration. Toutefois, cette loi de 1956 comporte certaines réserves. La corporation remplaçante n'a droit à cette déduction que si elle acquiert les biens de la corporation remplacée (a) en échange d'actions de son propre capital social, ou (b) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat des actions de la corporation remplacée, par la corporation remplaçante, moyennant des actions de cette dernière. En 1962, on a retiré ces conditions; dans la suite, la loi prévoyait simplement que toute compagnie pétrolière qui, en tout temps après 1954, avait acquis tous les biens ou sensiblement tous les biens d'une autre compagnie pétrolière, pouvait réclamer une déduction à titre de dépenses de forage et d'exploration faites par la corporation remplacée alors que cette dernière ne pouvait, elle, se prévaloir de ce droit. Le présent litige tire son origine de ce contexte.

En 1949, l'appelante a été constituée en corporation sous le nom de Sharples Oil (Canada) Ltd., en tant que filiale exclusive de la corporation américaine Sharples Oil Corporation, et jusqu'en 1960, elle était une compagnie pétrolière au Canada qui a engagé, durant cette période, des dépenses de forage et d'exploration d'un montant de $1,987,-547.19 supérieur au revenu que lui a procuré la production de pétrole et de gaz naturel. Le 30 novembre 1960, la compagnie-mère Sharples Oil Corporation, a acquis presque tous les biens de l'appelante en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. Les parties conviennent qu'à cette époque-là la compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que la transaction ne s'est pas opérée aux termes de l'une ou l'autre des conditions énoncées dans la Loi.

A la suite du transfert de ses biens, l'appelante a interrompu ses opérations et est restée inactive jusqu'en 1964. Cependant, en juin 1964, Mikas Oil Co. Ltd. a acheté des actionnaires de Sharples Oil Corporation, à la suite de la liquidation de cette dernière, l'ensemble des actions émises du capital social de l'appelante. En octobre 1964, l'appelante

name was changed to Gustavson Drilling (1964) Limited, in October 1964; thereafter the appellant recommenced business as an oil company with newly acquired assets, none of which had been used or owned by the appellant prior to June 1964. In computing its income for the 1965, 1966, 1967 and 1968 taxation years the appellant claimed deductions of $119,290.49; $447,369.99; $888,-084.10; and $31,179.00 respectively as part of the accumulated drilling and exploration expenses of $1,987,547.19. The Minister re-assessed and disallowed the claimed deductions. The appellant successfully appealed to the Tax Appeal Board but a Special Case was stated by consent, pursuant to Rule 475 of the Federal Court, and the appeal of the Minister was successful before Cattanach J. whose judgment in the Federal Court was upheld by the Federal Court of Appeal. The question on which the opinion of the Court was sought in the Special Case reads:

a adopté le nom de Gustavson Drilling (1964) Limited; par la suite, elle a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été possédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, l'appelante a déduit des sommes de $119,290.49, $447,369.99, $888,084.10 et $31,179.00 respectivement, qu'elle a réclamées comme partie des dépenses accumulées de forage et d'exploration chiffrées à $1,987,547.19. Le Ministre lui a imposé une nouvelle cotisation et a rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante; par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial, conformément à la règle 475 de la Cour fédérale, et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé par la Cour d'appel fédérale. Voici le libellé de la question litigieuse exposée dans le mémoire spécial:

> The question for the opinion of the Court is whether subsection (8a) of section 83A of the *Income Tax Act* as amended by the repeal of paragraphs (c) and (d) thereof by Statutes of Canada, 1962-63, c. 8, section 19, subsections (11) and (15), precludes the Respondent from deducting in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years amounts on account of the drilling and exploration expenses mentioned in paragraph 4 hereof, which but for the repeal would have been deductible by the Respondent under subsections (1) and (3) of section 83A of the Act.

> [TRADUCTION] La question soumise à la Cour est celle de savoir si le paragraphe (8a) de l'article 83A de la *Loi de l'impôt sur le revenu* tel que modifié par l'abrogation des alinéas *c*) et *d*) dudit article par les statuts du Canada, 1962-63, c. 8, article 19, paragraphes (11) et (15), interdit à l'intimée de déduire, dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968 les sommes représentant les dépenses de forage et d'exploration mentionnées au paragraphe 4 des présentes que, n'eût été l'abrogation, l'intimée aurait pu déduire en vertu des paragraphes (1) et (3) de l'article 83A de la Loi.

Subsections (1) and (3) of s. 83A of the *Income Tax Act*, under which the appellant claims the right to deductions, read as follows as applied to the 1965 to 1968 taxation years:

Les paragraphes (1) et (3) de l'art. 83A de la *Loi de l'impôt sur le revenu*, en vertu desquels l'appelante prétend avoir droit aux déductions, se lisent comme suit, tels qu'ils s'appliquaient aux années d'imposition 1965 à 1968:

> **83A.** (1) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of
>
> (*a*) the aggregate of such of the drilling and exploration expenses . . . as were incurred during the calendar years 1949 to 1952, to the extent that they were not deductible in computing income for a previous taxation year, or
>
> (*b*) of that aggregate, an amount equal to its income for the taxation year

> **83A.** (1) Une corporation . . . peut déduire, dans le calcul de son revenu, aux fins de la présente Partie, pour une année d'imposition, le moindre de
>
> *a*) l'ensemble des dépenses de forage et d'exploration . . . qui ont été faites au cours des années civiles 1949 à 1952, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou
>
> *b*) de cet ensemble, un montant égal à son revenu pour l'année d'imposition

. . .

minus the deductions allowed for the year by subsections (8a) and (8d) of this section . . .

. . .

(3) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of

(*c*) the aggregate of such of

(i) the drilling and exploration expenses . . .

. . .

as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year, or

(*d*) of that aggregate, an amount equal to its income for the taxation year

. . .

minus the deductions allowed for the year by subsections (1), (2), (8a) and (8d) of this section . . .

There can be no doubt that in the absence of subs. (8a) of s. 83A the drilling and exploration expenses claimed by the appellant would have been deductible by it. One must, then, turn to subs. (8a) upon the construction of which this case falls to be decided. In 1960, when the property of the appellant was acquired by Sharples Oil Corporation, the pertinent parts of subs. (8a) read:

83A. (8a) Notwithstanding subsection (8), where a corporation (hereinafter in this subsection referred to as the "successor corporation") . . .

. . .

has, at any time after 1954, acquired from a corporation (hereinafter in this subsection referred to as the "predecessor corporation") . . . all or substantially all of the property of the predecessor corporation used by it in carrying on that business in Canada,

(*c*) pursuant to the purchase of such property by the successor corporation in consideration of shares of the capital stock of the successor corporation, or

(*d*) as a result of the distribution of such property to the successor corporation upon the winding-up of the predecessor corporation subsequently to the purchase of all or substantially all of the shares of the capital stock of the predecessor corporation by the successor corporation in consideration of shares of the capital stock of the successor corporation,

. . .

moins les déductions allouées pour l'année par les paragraphes (8a) et (8d) du présent article . . .

. . .

(3) Une corporation . . . peut déduire, dans le calcul de son revenu aux fins de la présente Partie, pour une année d'imposition, le moindre de

c) l'ensemble

(i) des dépenses de forage et d'exploration . . .

. . .

qui ont été faites après l'année civile 1952 et avant le 11 avril 1962, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou

d) dudit ensemble, un montant égal à son revenu pour l'année d'imposition

. . .

moins les déductions allouées pour l'année par les paragraphes (1), (2), (8a) et (8d) du présent article . . .

Il n'y a aucun doute qu'en l'absence du par. (8a) de l'art. 83A, l'appelante aurait pu déduire les dépenses de forage et d'exploration qu'elle réclame. Il faut donc examiner ce par. (8a) dont l'interprétation sera déterminante du sort de cette affaire. En 1960, lorsque Sharples Oil Corporation a acquis les biens de l'appelante, les dispositions pertinentes du par. (8a) se lisaient comme suit:

83A. (8a) Nonobstant le paragraphe (8), lorsqu'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplaçante»). . .

. . .

a, en tout temps après 1954, acquis d'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplacée»). . .tous les biens ou sensiblement tous les biens de la corporation remplacée, utilisés par elle dans l'exercice de ladite entreprise au Canada,

c) en vertu de l'achat desdits biens par la corporation remplaçante moyennant des actions du capital social de la corporation remplaçante, ou

d) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat de toutes les actions ou sensiblement toutes les actions du capital social de la corporation remplacée, par la corporation remplaçante, moyennant des actions du capital social de la corporation remplaçante,

there may be deducted by the successor corporation, in computing its income under this Part for a taxation year, the lesser of

(*e*) the aggregate of

(i) the drilling and exploration expenses ... incurred by the predecessor corporation ...

. . .

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

Paragraphs (*c*) and (*d*) of subs. (8a) were repealed by c. 8, 1962-63 (Can.), s. 19, subs. (11), and the repeal was made applicable to the 1962 and subsequent taxation years.

In summary, therefore: Company A incurred drilling and exploration expenses; Company B acquired the property of Company A in 1960 but because of the manner in which the transaction was carried out Company B did not at that time qualify as a successor company and did not become entitled to deduct from its income the undeducted drilling and exploration expenses of Company A; in 1962 and thereafter, if the contentions of the Minister prevail, Company B qualified as a successor company and as such became entitled to claim such expenses as a deduction; Company A was denied such right by the concluding words of subs. (8a).

Before examining the rival contentions, several observations might be made. The first is with regard to the onus on a taxpayer who claims the benefit of an exemption. He must bring himself clearly within the language in which the exemption is expressed: *The Assessment Commissioner of the Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville*[2], at p. 194.

[2] [1973] S.C.R. 189.

cette dernière peut déduire, dans le calcul de son revenu selon la présente Partie pour une année d'imposition, le moindre

e) de l'ensemble

(i) des dépenses de forage et d'exploitation. . .faites par la corporation remplacée. . .

. . .

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Le paragraphe (11) de l'art. 19 du c. 8 des Statuts du Canada 1962-63 a abrogé les al. *c*) et *d*) du par. (8a), et cette abrogation est entrée en vigueur à compter de l'année d'imposition 1962 et suivantes.

En résumé: la compagnie A a fait des dépenses de forage et d'exploration; la compagnie B a acquis les biens de la compagnie A en 1960, mais à cause de la façon dont s'est opérée la transaction, la compagnie B ne pouvait pas être considérée à cette époque-là comme une compagnie remplaçante de sorte qu'elle n'a pu acquérir le droit de déduire de son revenu les dépenses non déduites de forage et d'exploration engagées par la compagnie A; en 1962 et par la suite, si l'on s'en tient aux prétentions du Ministre, la compagnie B a acquis la qualité de compagnie remplaçante et à ce titre, elle était dorénavant autorisé à déduire les dépenses en question; la fin du par. (8a) empêchait la compagnie A de se prévaloir de ce droit.

Avant d'examiner les prétentions rivales, il convient de formuler quelques remarques. La première porte sur le fardeau incombant au contribuable qui se prévaut d'une exemption. Il doit établir clairement que son cas s'insère dans l'exemption réclamée: *The Assessment Commissioner of the Corporation of the Village of Stouffville c. The Mennonite Home Association of York County et The Corporation of the Village of Stouffville*[2], à la p. 194.

[2] [1973] R.C.S. 189.

Secondly, the concept of a deduction being made by a taxpayer other than the one who incurred the expenditure is not unknown to the *Income Tax Act*. Section 85I(3) of the Act permits a new corporation formed on the amalgamation of two or more corporations after 1957 to deduct drilling and exploration expenses incurred by the predecessor corporation. Section 83A(3c) permits a joint exploration corporation to elect to renounce in favour of another corporation an agreed portion of the aggregate of the drilling and exploration expenses incurred by the joint exploration corporation.

Thirdly, by deleting paras. (*c*) and (*d*) of subs. (8a), Parliament liberalized the provision by making available to an expanded number of successor corporations a right to deduct. I do not think Parliament ever contemplated that a company which had sold or otherwise disposed of its assets could later have recourse to s. 83A. Parliament chose to grant a successor company the right to deduct drilling and exploration expenses incurred by a predecessor and the only problem in implementing its policy was with respect to the company which would have the right to deduct in the year of acquisition. The successor was accorded that right by the statute. The result of the amendment to the legislation in 1962 was to confer a right to claim deductions upon certain successor companies. This was a new right, coming from Parliament, not one acquired from a company's predecessor. At no time during the currency of the legislation has a predecessor company been able to transfer to a successor company entitlement to claim deductions in respect of drilling and exploration expenses.

It will be convenient now to consider in more detail the submissions of the appellant and of the Minister. Those of the Minister may be shortly put, resting on the language of the Act which, the Minister submits, is precise and unambiguous when read in the context of the whole statute and the general intendment of the Act. It is argued that there is no need to have recourse to presumptions of legislative intent, for such rules of construction are only useful in ascertaining the true

Deuxièmement, le principe selon lequel une déduction peut être effectuée par un contribuable autre que celui qui a encouru la dépense n'est pas étranger à la *Loi de l'impôt sur le revenu*. Le paragraphe (3) de l'art. 85I de la Loi autorise la nouvelle corporation, issue de la fusion de deux ou plusieurs corporations après 1957, à déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Le paragraphe (3c) de l'art. 83A permet à une corporation d'exploration en commun de renoncer en faveur d'une autre corporation à une partie convenue de ses dépenses de forage et d'exploration.

Troisièmement, en abrogeant les al. *c*) et *d*) du par. (8a), le Parlement a élargi les cadres de la disposition en permettant à un plus grand nombre de corporations remplaçantes de s'en prévaloir. Je crois que le Parlement n'a jamais envisagé la possibilité qu'une compagnie qui a vendu ses biens ou en a autrement disposé puisse plus tard se prévaloir de l'art. 83A. Le Parlement a choisi d'accorder à la compagnie remplaçante le droit de déduire les dépenses de forage et d'exploration engagées par la compagnie remplacée et, la seule difficulté dans la mise en œuvre de cette politique consistait à déterminer quelle compagnie serait autorisée à se prévaloir de la déduction pour l'année de l'acquisition. La loi a accordé ce droit au remplaçant. Les dispositions modificatrices de 1962 ont conféré à certaines compagnies remplaçantes le droit de se prévaloir des déductions en question. C'était donc un droit nouveau accordé par le Parlement et non par la compagnie remplacée. Jamais la loi n'a permis à une compagnie remplacée de céder à une compagnie remplaçante le droit de se prévaloir des déductions relatives aux dépenses de forage et d'exploration.

Il convient maintenant d'examiner de plus près les allégations de l'appelante et du Ministre. Les allégations de ce dernier se résument en quelques mots et reposent sur le texte de la Loi qui, selon lui, est clair et précis lorsque son lecteur tient compte de l'ensemble et de l'esprit général de la Loi. On allègue qu'il n'est pas nécessaire d'avoir recours aux présomptions portant sur l'intention du législateur puisque ces règles d'interprétation ne sont utiles dans la détermination du sens vérita-

meaning where the language of the statute is not clear and plain: per Lamont J. in *Acme Village School District v. Steele-Smith*[3], at p. 51. There is much to this submission. I do not think that the appellant can sustain its position on a literal reading of subs. (8a), the language of which places appellant fairly and squarely in the category of a predecessor company. The appellant, however, seeks to avoid a literal construction of the subsection with a three-pronged argument, which must fairly be considered, based upon (a) the presumption against retrospective operation of statutes; (b) the presumption against interference with vested rights; (c) the meaning to be given to the word "aggregate" in subs. (8a). With regard to points (a) and (b) it would not be sufficient for the appellant to establish that the legislation had retrospective effect; it must also show it had an accrued right which was adversely affected by the legislation.

First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of

[3] [1933] S.C.R. 47.

ble que lorsque le texte est obscur et ambigu: voir les propos du juge Lamont dans *Acme Village School District c. Steele-Smith*[3], à la p. 51. Cette allégation est fort pertinente. Je ne crois pas que l'appelante puisse obtenir gain de cause en s'en tenant au sens littéral du par. (8a) puisque sa rédaction attribue nettement à l'appelante la qualité de compagnie remplacée. Toutefois, elle cherche à éviter une interprétation littérale de ce paragraphe et soumet à cet effet une triple argumentation qu'il convient d'examiner équitablement et qui se fonde sur a) la présomption à l'encontre de la rétroactivité des lois; b) la présomption voulant qu'on ne puisse porter atteinte aux droits acquis; c) la signification à donner au mot «ensemble» du par. (8a). Concernant les points a) et b), l'appelante doit faire plus que démontrer la portée rétroactive de la loi; elle doit également établir qu'elle possédait un droit acquis auquel la loi a porté atteinte.

Premièrement, la rétroactivité. Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Une disposition modificatrice peut prévoir qu'elle est censée être entrée en vigueur à une date antérieure à son adoption, ou qu'elle porte uniquement sur les transactions conclues avant son adoption. Dans ces deux cas, elle a un effet rétroactif. A première vue, la présente affaire peut s'apparenter au deuxième cas, mais je suis d'avis que l'analyse de la disposition abrogative démontre qu'elle n'a aucune portée rétroactive dans le sens qu'elle modifie des droits acquis, bien qu'elle porte incontestablement atteinte aux transactions passées. L'article, tel que modifié par la disposition abrogative, ne vise pas les années d'imposition antérieures à la date de la modification; il ne cherche pas à s'immiscer dans le passé et ne prétend pas signifier qu'à une date antérieure, il faille considérer que le droit ou les droits des parties étaient ce qu'ils n'étaient pas alors. Pour autant que l'appelante soit concernée, cet article ne vise qu'à retirer pour l'avenir le droit de faire certaines déductions dont il était aupara-

[3] [1933] R.C.S. 47.

the amending statute.

The appellant maintains that in 1960, at the time of the relevant transaction, it had the status of a non-predecessor company under s. 83A(8a), as it then read, and the right to carry over deductions to subsequent tax years; that the 1962 amendment could not operate retrospectively to change its status from non-predecessor company under s. 83A(8a) with the consequence that the drilling and exploration expenses became thereafter deductible only by Sharples Oil Corporation, the successor company. The appellant concludes that the right to deduct the said expenses remains with it in perpetuity. I cannot agree. It is immaterial that the appellant company had a particular status as the result of previous legislation. Parliament, acting within its competence, has said that as of 1962 and for the purposes of calculating taxable income in future years, the appellant has a different status.

The contention of appellant that the repeal has application only in respect of acquisitions carried out subsequent to the passage of the repealing enactment would introduce a limitation upon the amplitude of subs. (8a), as amended, which is not supported by the language of the subsection. It would also deny successor corporations rights which s. 83A would seem to accord them. The interpretation pressed by appellant tends also to ignore the words "at any time after 1954". Appellant submits that these words may, and should, have application to the extent of preserving the rights of a successor corporation which, prior to the repealing enactment, carried out an acquisition in one or other of the manners set out in subs. (*c*) and (*d*) and therefore prior to repeal enjoyed the benefit of subs. (8a) but they should not have further force or effect. The difficulty with this submission is that one can find nothing in the legislation as it read in respect of the 1965 and subsequent taxation years which would support a distinction between those corporations which

vant possible de tirer avantage; l'article n'a aucune incidence sur ce droit dans la mesure où il a été exercé à une date antérieure à l'adoption de la loi modificatrice.

L'appelante prétend qu'elle avait en 1960, à l'époque de la transaction en question, la qualité d'une compagnie non remplacée aux termes du par. (8a) de l'art. 83A, tel qu'alors libellé, ainsi que le droit de reporter des déductions au cours des années d'imposition subséquentes; elle soutient également que la modification de 1962 ne peut avoir d'effet rétroactif de façon à lui conférer maintenant la qualité de compagnie remplacée aux termes du par. (8a) de l'art. 83A, de sorte que les dépenses de forage et d'exploration pouvaient être déduites, par la suite, uniquement par Sharples Oil Corporation, la compagnie remplaçante. Finalement, l'appelante conclut qu'elle conserve à perpétuité le droit de déduire les dépenses en question. Je ne peux partager cette prétention. Il importe peu que la compagnie appelante ait eu une qualité particulière sous l'ancienne loi. Sans outrepasser sa compétence, le Parlement a statué qu'à compter des années d'imposition 1962 et suivantes, pour les fins du calcul du revenu imposable, l'appelante aurait une qualité différente.

La prétention de l'appelante selon laquelle l'abrogation agit seulement sur les acquisitions faites ultérieurement à l'adoption de la loi abrogative, a pour effet de restreindre la portée du par. (8a) dans sa forme modifiée, ce que le texte du paragraphe en question ne démontre aucunement. Cette prétention a également pour effet d'empêcher les corporations remplaçantes de se prévaloir des droits que leur accorde semble-t-il, l'art. 83A. L'interprétation mise de l'avant par l'appelante tend également à ignorer les mots «en tout temps après 1954». Cette dernière prétend que ces mots peuvent et doivent agir uniquement dans la mesure où ils permettent de garantir les droits d'une corporation remplaçante qui, antérieurement à la loi abrogative, a fait une acquisition suivant l'une ou l'autre des méthodes décrites aux al. *c*) et *d*) et qui, par conséquent, tirait avantage du par. (8a) avant l'abrogation. Ce qui fait obstacle à cette prétention est l'impossibilité de trouver dans cette partie de la loi portant sur les années d'imposition 1965 et suivantes, un indice qui étayerait une

acquired the property of other corporations prior to the 1962 amendment, in accordance with subs. (*c*) and (*d*), and those which acquired the property of other corporations following the amendment.

The *Income Tax Act* contains a series of very complicated rules which change frequently, for the annual computation of world income. The statute in force in the particular taxation year must be applied to determine the taxpayer's taxable income for that year. The effect of the repealing enactment of 1962 was merely to provide that in future years certain new rules should apply affecting deductions from income of exploration and development expenses. Although the effect of the repealing enactment may appear to have been to divest the appellant of a right to deduct which it had earlier enjoyed and in some manner have caused a transmutation of an antecedent transaction, I do not think that, when the matter is closely examined, such is the true effect. In each of the years 1949 to 1960 the appellant had a right to deduct. The Act in each of those years conferred the right. In 1960 the appellant transferred its assets. The contract of sale, if any, forms no part of the record. So far as the record discloses, no mention was made of drilling and exploration espenses at the time. After disposing of its property, it was no longer a corporation whose principal business was that of exploring or drilling for petroleum or natural gas nor did it have income. It, therefore, no longer had a right to deduct. No claim was made by it in the 1961, 1962, 1963 or 1964 taxation years. By the time the appellant resumed business it had no right under the then legislative scheme to claim for drilling and exploration expenses incurred in earlier years. Any claim which it might make for exploration and drilling expenses could only be in respect of expenses incurred following resumption of business. It may seem unfortunate that an amendment which was intended to liberalize the legislation by removing a barrier to the inheritance of drilling and exploration expenses should have the effect of denying a predecessor company such as the appellant from enjoying a right which it would have enjoyed in the absence of the repeal but the legis-

distinction entre les corporations qui ont fait l'acquisition des biens d'autres corporations avant la modification de 1962, en conformité avec les al. *c*) et *d*), et celles qui ont fait l'acquisition des biens d'autres corporations postérieurement à la modification.

La *Loi de l'impôt sur le revenu* contient une série de règles très complexes modifiées fréquemment qui servent au calcul annuel du revenu global. Pour déterminer le revenu imposable d'un contribuable pour une année particulière, il faut appliquer la loi qui était alors en vigueur. La disposition abrogative de 1962 a simplement pour effet d'introduire pour les années subséquentes de nouvelles règles touchant la déductibilité des dépenses d'exploration et de mise en valeur. Bien que la disposition abrogative puisse paraître avoir pour effet de dépouiller l'appelante du droit dont elle jouissait auparavant de faire certaines déductions et d'une certaine façon causé la transmutation d'une transaction antérieure, je suis d'avis qu'un examen attentif de la question démontre qu'il n'en est pas ainsi. De 1949 à 1960, la Loi en vigueur au cours de chacune de ces années autorisait l'appelante à se prévaloir de la déduction. En 1960, l'appelante a transféré son actif. Le contrat de vente, s'il en existe un, n'apparaît pas au dossier et dans la mesure des révélations qui y sont contenues, il n'a pas été question à l'époque des dépenses de forage et d'exploration. Après avoir disposé de ses biens, l'appelante n'était plus une corporation s'occupant principalement de faire de l'exploration ou forage pour la découverte de pétrole ou de gaz naturel, et elle n'avait plus de revenu. Elle ne pouvait donc plus se prévaloir de la déduction en question. Au cours des années d'imposition 1961, 1962, 1963 et 1964, elle n'a fait aucune réclamation. A l'époque où l'appelante a repris ses activités, elle n'avait plus le droit, en vertu de la loi alors en vigueur, de réclamer les dépenses de forage et d'exploration engagées antérieurement. Il lui était possible de réclamer uniquement les dépenses de forage et d'exploration engagées après qu'elle eut repris ses activités. Il est peut-être malheureux qu'une modification dont le but est de libéraliser la loi en facilitant la transmission des dépenses de forage et d'exploration, ait pour effet de priver une compagnie remplacée comme l'appe-

lation as amended is unambiguous and clear. After the repeal of paras. (*c*) and (*d*) of subs. (8a) in 1962 and for the purpose of paying income tax in the years following 1962, the appellant company is a predecessor company within the meaning of subs. (8a) and precluded from deducting the drilling and exploration expenses incurred by it prior to November 10, 1960.

Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*[4], at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. The only rights which a taxpayer in any taxation year can be said to enjoy with respect to claims for exemption are those which the *Income Tax Act* of that year give him. The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the Income Tax Acts of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmen-

[4] [1933] S.C.R. 629.

lante d'un droit dont elle aurait pu se prévaloir en l'absence de l'abrogation, mais il n'en demeure pas moins que la loi dans sa forme modifiée est claire et précise. Après l'abrogation des al. *c*) et *d*) du par. (8a) en 1962 et aux fins du calcul de l'impôt à payer pour les années postérieures à 1962, la compagnie appelante est une compagnie remplacée au sens du par. (8a) et de ce fait, il lui est impossible de déduire les dépenses de forage et d'exploration engagées par elle avant le 10 novembre 1960.

Deuxièmement, l'interférence avec des droits acquis. Selon la règle, une loi ne doit pas être interprétée de façon à porter atteinte aux droits existants relatifs aux personnes ou aux biens, sauf si le texte de cette loi exige une telle interprétation: *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*[4], à la p. 638. La présomption selon laquelle une loi ne porte pas atteinte aux droits acquis à moins que la législature ait clairement manifesté l'intention contraire, s'applique sans discrimination, que la loi ait une portée rétroactive ou qu'elle produise son effet dans l'avenir. Ce dernier type de loi peut être mauvais s'il porte atteinte à des droits acquis sans l'exprimer clairement. Toutefois, cette présomption s'applique seulement lorsque la loi est d'une quelconque façon ambiguë et logiquement susceptible de deux interprétations. Il est évident que la plupart des lois modifient des droits existants ou y portent atteinte d'une façon ou d'une autre, et les lois fiscales ne font pas exception. Les seuls droits dont un contribuable peut se prévaloir au cours d'une année d'imposition au regard de réclamations d'exemptions sont ceux que lui accordent la *Loi de l'impôt sur le revenu* alors en vigueur. L'appelante fonde son argumentation sur le fait qu'elle possède un droit acquis et continu de déduire dans le calcul de son revenu les dépenses de forage et d'exploration engagées par elle, alors qu'il est clair que la *Loi de l'impôt sur le revenu* de 1960 et des années antérieures n'accorde aucun droit à l'égard des années d'imposition 1965 et suivantes. C'est une erreur que de considérer les dépenses de forage et d'exploration comme un compte en banque duquel il est possible d'effectuer des retraits indéfiniment ou, du moins,

[4] [1933] R.C.S. 629.

tal policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: *Abbott v. Minister of Lands*[5], at p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*[6]; *Director of Public Works v. Ho Po Sang*[7].

Section 35 of the *Interpretation Act*, R.S.C. 1970, c. I-23 is cited in support of the appellant. It reads:

35. Where an enactment is repealed in whole or in part, the repeal does not

. . .

(*b*) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;

(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

I agree with Mr. Justice Thurlow of the Federal Court of Appeal that it cannot be said that the repeal of paras. (*c*) and (*d*) affected their previous operation or anything done or suffered by appellant thereunder since paras. (*c*) and (*d*) never had any operation upon or application to anything done or suffered by appellant. I am also in agreement with Mr. Justice Thurlow that it cannot be said that any right acquired by appellant under paras. (*c*) or (*d*) was affected by their repeal, since no right was ever acquired by appellant under either of them. This section is merely the statutory embodiment of the common law presumption in respect of vested rights as it applies to the repeal of legislative enactments and in my opinion the sec-

[5] [1895] A.C. 425.
[6] [1961] C.T.C. 490 (Exch.).
[7] [1961] 2 All E.R. 721 (P.C.).

jusqu'à l'épuisement du solde. Personne n'a le droit acquis de se prévaloir de la loi telle qu'elle existait par le passé; en droit fiscal, il est impérieux que la législation reflète l'évolution des besoins sociaux et de l'attitude du gouvernement. Un contribuable est libre de planifier sa vie financière en se fondant sur l'espoir que le droit fiscal demeure statique; il prend alors le risque d'une modification à la législation.

Le simple droit de se prévaloir d'un texte législatif abrogé, dont jouissent les membres de la communauté ou une catégorie d'entre eux à la date de l'abrogation d'une loi, ne peut être considéré comme un droit acquis: *Abbott v. Minister of Lands*[5], à la p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*[6], *Director of Public Works v. Ho Po Sang*[7].

L'article 35 de la *Loi d'interprétation*, S.R.C. 1970, c. I-23 est cité en appui de la thèse de l'appelante. En voici le texte:

35. Lorsqu'un texte législatif est abrogé en tout ou en partie, l'abrogation

. . .

b) n'atteint ni l'application antérieure du texte législatif ainsi abrogé ni une chose dûment faite ou subie sous son régime;

c) n'a pas d'effet sur quelque droit, privilège, obligation ou responsabilité acquis, né, naissant ou encouru sous le régime du texte législatif ainsi abrogé.

Je partage l'avis du juge Thurlow de la Cour d'appel fédérale selon lequel il ne peut être dit que l'abrogation des al. *c*) et *d*) atteint leur application antérieure ni une chose dûment faite ou subie sous leur régime par l'appelante, puisque les al. *c*) et *d*) ne se sont jamais appliqués à l'appelante ni à une chose dûment faite ou subie par elle. Je souscris encore une fois à l'avis du juge Thurlow lorsqu'il affirme que l'on ne peut pas dire que l'abrogation des al. *c*) et *d*) a eu un effet sur quelque droit acquis par l'appelante sous leur régime, puisque cette dernière n'a jamais acquis de droits sous le régime de l'un quelconque d'entre eux. Cet article représente simplement la consécration législative de la présomption de droit commun relative aux

[5] [1895] A.C. 425.
[6] [1961] C.T.C. 490 (Exch.).
[7] [1961] 2 All. E.R. 721 (P.C.).

tion does nothing to advance appellant's case. Appellant must still establish a right or privilege acquired or accrued under the enactment prior to repeal, and this it cannot do.

Third, "aggregate". The somewhat tortuous argument on this point is largely a mere embellishment of the retrospectivity argument. It runs as follows. Even if the appellant is regarded as a predecessor corporation, the accumulated drilling and exploration expenses may nevertheless be deducted by the appellant because (1) the prohibition expressed in the concluding paragraph of subs. (8a) extends only to "the aggregate determined under paragraph (*e*)"; (2) such aggregate in each of the years 1965 to 1968 is *nil* by reason of the necessity under subparas. (iii) and (iv) thereof of determining such aggregate in the first instance "for the taxation year in which the property so acquired was acquired by the successor corporation", *i.e.*, 1960; (3) subparas. (iii) and (iv) of subs. (8a)(*e*) have been construed by this Court in *Hargal Oils Ltd. v. Minister of National Revenue*[8], at pp. 295-6, where it was held that the "aggregate" is to:

> . . . consist of expenses not deductible by the predecessor corporation in the taxation year in which the property was acquired by the successor corporation, but which would have been deductible by the predecessor corporation in that taxation year, "but for the provisions of . . . this subsection."

(4) this passage presupposes the existence of the qualified predecessor and a qualified successor corporation in the taxation year in which the transfer of property took place and the amount to be included in the aggregate can only be determined in the taxation year in which the transaction occurred; (5) in the 1960 taxation year subs. (8a) was not applicable to appellant and there cannot be in that taxation year either a successor corporation or a predecessor corporation nor any "aggregate" to which the concluding paragraph of

[8] [1965] S.C.R. 291.

droits acquis telle qu'elle existe à l'égard de l'abrogation des dispositions législatives et, selon moi, cet article n'ajoute rien à l'argumentation de l'appelante. Cette dernière doit toujours démontrer qu'elle possède un droit ou un privilège né ou acquis sous le régime du texte législatif avant son abrogation, ce qu'elle ne peut faire.

Troisièmement, le mot «ensemble». Cet argument quelque peu tortueux reprend en grande partie, sous un jour plus favorable, l'argument de la rétroactivité. En voici l'essentiel: même si l'appelante est considérée comme une corporation remplacée, elle peut néanmoins déduire les dépenses accumulées de forage et d'exploration parce que (1) l'interdiction spécifiée dans le dernier alinéa du par. (8a) porte uniquement sur «l'ensemble déterminé selon l'al. *e*)»; (2) cet ensemble pour chacune des années d'imposition 1965 à 1968 est nul, vu la nécessité, aux termes des sous-al. (iii) et (iv) de l'al. *e*), de déterminer d'abord cet ensemble «pour l'année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante», c.-à-d. 1960; (3) les sous-al. (iii) et (iv) de l'al. *e*) du par. (8a) ont été interprétés par cette Cour dans *Hargal Oils Ltd. c. Le ministre du Revenu national*[8], aux pp. 295 et 296, où cette dernière a statué que le mot «ensemble»:

> [TRADUCTION] . . . comprend les dépenses qui n'étaient pas déductibles par la compagnie remplacée dans le calcul de son revenu pour l'année d'imposition où ses biens ont été acquis par la compagnie remplaçante, mais qui auraient été déductibles par la compagnie remplacée dans le calcul de son revenu pour cette année d'imposition-là «en l'absence des dispositions ... du présent paragraphe».

(4) cet extrait présuppose l'existence de corporations remplacées et remplaçantes autorisées à l'époque du transfert des biens, et il est possible de déterminer le montant à inclure dans l'ensemble uniquement au cours de l'année d'imposition où s'est effectuée la transaction; (5) au cours de l'année d'imposition 1960, le par. (8a) n'était pas applicable à l'appelante, et il ne pouvait y avoir à cette époque soit une corporation remplacée ou une corporation remplaçante, ni aucun «ensemble» auquel pourrait se rattacher dans les années d'im-

[8] [1965] R.C.S. 291.

subs. (8a) can be related in subsequent taxation years; (6) the repealing enactment is made applicable to the 1962 and subsequent taxation years and cannot be given earlier effect in determining what is to be included in the "aggregate".

I do not think that the language of subs. (8a) or the gloss which it is suggested was put upon that language in the quoted passage from *Hargal's* case leads to the conclusion for which appellant contends. The quoted passage from *Hargal's* case merely compresses the words of subs. (8a). As applied to the facts of the case now before us, subs. (8a) provides that there may be deducted by the successor corporation the "aggregate" of the drilling and exploration expenses incurred by the appellant (*i.e.* approximately $2,000,000) to the extent that such expenses (a) were not deductible by the appellant in 1960 or earlier; and (b) would but for subs. (8a) have been deductible by the appellant in 1960. The subsection does not postulate the existence of a successor corporation and a predecessor corporation in the year of acquisition. The amount of the aggregate must be determined each year in which the deduction is sought, not for the taxation year of acquisition. The starting point in computing the aggregate is to total the expenditures on drilling and exploration; this amount must then be reduced to the extent that the expenses were deductible by the predecessor corporation in the year of acquisition or in earlier years; the amount which the successor corporation may deduct must not exceed the amount which would have been deductible by the predecessor in the year of acquisition in the absence of subs. (8a). It will be observed that the appellant is claiming to be entitled to a deduction under s. 83A(1) and (3), both of which subsections speak of the "aggregate" of drilling and exploration expenses to the extent that they were not deductible in computing income for a previous taxation year. It would be strange if the "aggregate" computed in accordance with the wording of s. 83A(1) and (3) would amount to $2,000,000 but computed in accordance with the analogous wording of s. 83A(8a) would be nil. In my opinion the "aggregate" is the same whether computed under s. 83A(1) and (3) or under s. 83A(8a). There is no difficulty in applying the words of s. 83A(8a) in this case. The

position subséquentes, le dernier alinéa du par. (8a); (6) le texte législatif abrogatif est applicable aux années d'imposition 1962 et suivantes et ne peut rétroagir de façon à déterminer ce qu'il faut inclure dans l'«ensemble».

Je ne suis pas d'avis que le texte du par. (8a) et l'interprétation spécieuse qui, prétend-on, en a été donnée dans l'extrait cité de l'arrêt *Hargal* mènent à la conclusion recherchée par l'appelante. L'extrait cité de l'arrêt *Hargal* ne fait que condenser le texte du par. (8a). Tel qu'appliqué aux faits de la présente affaire, le par. (8a) dispose que la corporation remplaçante peut déduire l'«ensemble» des dépenses de forage et d'exploration engagées par l'appelante (c.-à-d. approximativement $2,000,000) dans la mesure où lesdites dépenses a) n'étaient pas déductibles par l'appelante en 1960 ou avant cette date; et b) auraient été déductibles par l'appelante en 1960 en l'absence des dispositions du par. (8a). Ce paragraphe ne présuppose pas l'existence, au cours de l'année d'acquisition, de corporations remplaçantes et remplacées. Le montant de l'ensemble doit être déterminé chaque année où l'on se prévaut de la déduction, et non pour l'année d'imposition où s'est fait l'acquisition. Pour déterminer le montant de l'ensemble, il faut d'abord établir le total des dépenses de forage et d'exploration; ce montant doit ensuite être réduit dans la mesure où les dépenses étaient déductibles par la corporation remplacée dans le calcul de son revenu pour l'année d'acquisition ou pour toute l'année antérieure; le montant déductible par la corporation remplaçante ne doit pas dépasser celui que la compagnie remplacée aurait pu déduire du calcul de son revenu pour l'année de l'acquisition en absence du par. (8a). Il convient de souligner que l'appelante prétend avoir droit à une déduction en vertu des par. (1) et (3) de l'art. 83A, qui traitent de l'«ensemble» des dépenses de forage et d'exploration, dans le mesure où elles n'étaient pas déductibles du revenu d'une année d'imposition antérieure. Il serait plutôt étrange que l'«ensemble» calculé en conformité du texte des par. (1) et (3) de l'art. 83A totalise un montant de $2,000,000, tandis qu'il serait nul lorsque calculé en conformité du texte analogue du par. (8a) de l'art. 83A. A mon avis, l'«ensemble» est le même, qu'il soit calculé selon les par. (1) et (3) de l'art. 83A ou selon

aggregate of the drilling and exploration expenses deductible by the appellant prior to the repealing enactment and since that time deductible by the successor corporation is readily identifiable and has been quantified.

I would dismiss the appeal with costs.

The judgment of Pigeon and de Grandpré JJ. was delivered by

PIGEON J. (*dissenting*)—The appellant is an oil producing company. It was incorporated under the laws of Canada on May 26, 1949, under the name of Sharples Oil (Canada) Ltd. It was a wholly owned subsidiary of Sharples Oil Corporation, a U.S. company. It did incur drilling and exploration expenses for which it would, in later years, be entitled to claim a deduction from income for taxation purposes. As of November 30, 1960, the amount of such expenditures that could be carried forward was nearly $2,000,000 (the exact amount was agreed to be $1,987,547.19). Preliminary to the winding-up of the parent company, the appellant transferred to it on that date substantially all its assets. Under subs. (8a) of s. 83A of the *Income Tax Act* as it then read (that is as enacted by 1956 c. 39, s. 23 with some immaterial amendments), this conveyance did not transfer to the parent company appellant's entitlement to future deductions because it did not meet the requirements of subparas, (*c*) and (*d*). Therefore, the conveyance did not have the effect of depriving the appellant from its entitlement to deductions in the future on that account by virtue of the concluding paragraph of subs. (8a):

and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

In the winding-up of the parent company, the appellant's shares were distributed to the parent's

le par (8a) de l'art. 83A. L'application des termes du par. (8a) de l'art. 83A ne soulève aucune difficulté en l'espèce. L'ensemble des dépenses de forage et d'exploration déductibles par l'appelante avant le texte législatif abrogatif, et depuis lors déductible par la corporation remplaçante, est facilement identifiable et a été déterminé.

Je suis d'avis de rejeter le pourvoi avec dépens.

Le jugement des juges Pigeon et de Grandpré a été rendu par

LE JUGE PIGEON (*dissident*)—L'appelante est une compagnie pétrolière. Elle a été constituée par charte fédérale le 26 mai 1949 sous le nom de Sharples Oil (Canada) Ltd. Elle était une filiale exclusive de Sharples Oil Corporation, une compagnie américaine. Elle a engagé des dépenses de forage et d'exploration pour lesquelles il lui était possible, dans les années à venir, de réclamer une déduction dans le calcul de son revenu imposable. Le 30 novembre 1960, le montant de ces dépenses susceptibles d'être reportées totalisait presque $2,000,000 (les parties ayant convenu d'un montant exact de $1,987,547.19). Antérieurement à la liquidation de la compagnie-mère, l'appelante lui a transféré, à cette date-là, presque tout son actif. En vertu du par. (8a) de l'art. 83A de la *Loi de l'impôt sur le revenu*, tel qu'alors libellé (c'est-à-dire, tel que mis en vigueur par 1956 c. 39, art. 23 avec quelques modifications non pertinentes), ce transfert de l'actif n'a pas entraîné le transfert à la compagnie-mère du droit de l'appelante à des déductions futures parce que l'actif n'a pas été acquis conformément aux dispositions des al. *c*) et *d*). Par conséquent, en vertu du dernier alinéa du par. (8a) que voici, ce transfert n'a pas eu pour effet de retirer à l'appelante le droit de réclamer, pour les années d'imposition à venir, des déductions relatives aux dépenses engagées:

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Au cours des procédures de liquidation de la compagnie-mère, ses actionnaires ont acquis les

shareholders who, as of June 18, 1964, sold all those shares to Mikas Oil Co. Ltd. for $280,000. The appellant's name was then changed to Gustavson Drilling (1964) Limited and it resumed operations as an oil producing company. Having made profits, it claimed deductions from income on account of the previously incurred drilling and exploration expenses above mentioned. These deductions totalling over $1,500,000 for 1965-68 were disallowed by reassessments. They were restored by the Tax Appeal Board but, on appeal, they were denied by the Federal Court at trial and on appeal.

The reason for which the deductions were denied was that in 1962, some two years after the transfer of appellant's assets to its parent, subparas. (*c*) and (*d*) of ss. (8a) had been repealed by statute applicable to 1962 and following taxation years. It was said in effect that by virtue of this amendment, the entitlement to the future deductions had gone with the assets to the parent company as a "successor corporation". Of course, as the latter had been wound-up, it could not take advantage of the provision but it was said that this had destroyed, as of 1962, any right which the appellant had to claim deductions on account of drilling and exploration expenditures incurred before November 30, 1960, by virtue of the concluding paragraph of ss. (8a) amended by the 1962 statute to read:

> and, in respect of any such expenses included in the aggregate determined under paragraph (*e*), no deduction may be made under this section by the predecessor corporation in computing its income for a taxation year subsequent to its taxation year in which the property so acquired was acquired by the successor corporation.

In my view, the legislative change effected in 1962 by the repeal of paras. (*c*) and (*d*) of subs. (8a) was not an alteration in the scheme of deductions for drilling and exploration expenses, but a modification in the transferability of the entitlement to those deductions. In essence, the Minister's contention which prevailed in the court below against the Tax Appeal Board's conclusion was that, although the transfer of appellant's property

actions de l'appelante et, le 18 juin 1964, ils les ont vendues à Mikas Oil Co. Ltd. pour la somme de $280,000. L'appelante a alors adopté le nom de Gustavson Drilling (1964) Limited et elle a repris ses activités comme compagnie pétrolière. Ayant réalisé des profits, l'appelante a réclamé, dans le calcul de son revenu, la déduction de certaines sommes au regard de ses dépenses de forage et d'exploration engagées antérieurement. Ces déductions, qui totalisaient plus de $1,500,000 pour les années 1965 à 1968, ont été refusées à l'occasion de nouvelles cotisations. La Commission d'appel de l'impôt les a rétablies mais elles ont ensuite été refusées par la Cour fédérale en première instance et en appel.

Les déductions ont été refusées en raison de l'abrogation, en 1962, soit deux ans après le transfert de l'actif de l'appelante à la compagnie-mère, des sous-alinéas *c*) et *d*) du par. (8a) par une loi applicable aux années d'imposition 1962 et suivantes. En fait, on a statué qu'en vertu de cette modification, la compagnie-mère en tant que «corporation remplaçante» avait acquis, en même temps que l'actif, le droit aux déductions futures. Naturellement, vu la liquidation de cette dernière, elle n'a pu tirer profit de cette disposition, mais on a statué, en vertu du dernier alinéa du par. (8a), tel que modifié en 1962 et reproduit ci-après, que cela avait retiré à l'appelante, à compter de 1962, le droit de se prévaloir d'une déduction à titre de dépenses de forage et d'exploration engagées avant le 30 novembre 1960:

> et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa *e*), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

A mon avis, la modification législative apportée en 1962 par l'abrogation des al. *c*) et *d*) du par. (8a) n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration; elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Selon le Ministre, bien que le transfert des biens de l'appelante à Sharples Oil Corporation effectué le 13 novembre 1960 ne s'étendait pas au droit à ces

to Sharples Oil Corporation made on November 13, 1960, did not include the entitlement to the deductions in question, this right became included in this transfer when, in 1962, an amendment to the *Income Tax Act* repealed the provisions that had prevented it from going to the transferee with the property transferred.

The rule against retrospective operation of statutes is, of course, no more than a rule of construction. It operates more or less strongly according to the nature of the enactment. However, nowhere does it operate more strongly than when any other construction would result in altering the effect of contracts previously entered into. In *Reid v. Reid*[9], Bowen L.J. said (at pp. 408-9):

> Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis,* that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a large retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.
>
> Now as to sect. 5, it applies in express terms to marriages contracted before the commencement of the Act. Then are we to take the view which Mr. *Barber* puts forward, ... this construction may displace or disturb previous dispositions of property, and therefore unless we can read in plain language that the Legislature intended what Mr. *Barber* contends for, the principle of construction with which I set out forbids us to adopt that construction.

Here, the effect of the contract was to leave the entitlement to the deductions intact in the hands of the transferor but, if the legislative change is read as applicable to that contract, the result is an outright forfeiture or confiscation of this valuable

[9] (1886), 31 Ch.D. 402.

déductions, ce droit a été incorporé au transfert en question lorsqu'en 1962 une modification à la *Loi de l'impôt sur le revenu* a abrogé les dispositions qui consacraient l'intransmissibilité de ce droit à la personne à qui les biens avaient été transférés. Cette prétention du Ministre a prévalu devant le tribunal d'instance inférieure à l'encontre de la conclusion de la Commission d'appel de l'impôt.

Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation. Sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. Dans *Reid v. Reid*[9], le lord juge Bowen tient les propos suivants (aux pp. 408 et 409):

> [TRADUCTION] Or, la règle particulière d'interprétation dont on a fait mention, mais qui est utile uniquement lorsque le texte d'une loi du Parlement est obscur, se rattache à la célèbre maxime *omnis nova constitutio futuris formam imponere debet non praeteritis,* c'est-à-dire que sauf exception, la nouvelle loi doit être interprétée de façon à minimiser au possible l'interférence avec des droits acquis. Selon moi, même lorsque nous interprétons une loi ou un article qui ont une portée rétroactive, nous devons toujours avoir à l'esprit que cette maxime entre en jeu dès que le texte cesse d'être clair. Il s'agit là d'un corollaire nécessaire et naturel de la règle générale selon laquelle il ne faut pas donner à un article une portée rétroactive plus considérable que celle que la législature a manifestement voulu lui donner, même si cette loi a, dans une certaine mesure, un effet rétroactif.
>
> Or, quant à l'art. 5, il s'applique expressément aux mariages contractés avant l'entrée en vigueur de la Loi. Allons-nous donc adopter l'opinion émise par M. *Barber*, ... cette interprétation peut toucher ou porter atteinte à des actes antérieurs, elle est donc inadmissible selon le principe énoncé au début de mes motifs, à moins qu'il nous apparaisse clairement que la prétention de M. *Barber* est conforme à l'intention du législateur.

En l'espèce, le contrat avait pour effet de laisser intact entre les mains du cédant le droit aux déductions, mais, si la modification législative est jugée applicable, il y a alors déchéance complète de ce droit précieux à cause de la liquidation du

[9] (1886), 31 Ch.D. 402.

right, the transferee having been wound-up. On that construction, if the transferee was a subsisting oil company it would, without any consideration therefor, obtain this valuable right in addition to the properties conveyed. In the instant case, the appellant's shares were sold after the 1962 amendment but, on the Minister's submission, it would make no difference if they had been bought before the amendment, the purchasers would have lost what they paid for. Bearing in mind the presumption against retrospective operation, can the statute be read so as to avoid this unjust result?

The application provision of the 1962 amending act enacts that the relevant subsection is applicable to the 1962 and subsequent taxation years. The Minister says this means that assessments for those years are to be made in accordance with the law as changed by the new statute. I do not deny that such is ordinarily the effect of an enactment in those terms. However, I cannot see why, in view of the nature of the substantive enactment, it would not be read differently with respect to the provisions with which we are concerned, namely, provisions which concern the legal effect of contracts in relation to a scheme of entitlement to deductions intended to be available for many years in the future. Because of the special risk involved in exploring and drilling for oil Parliament has departed from the principle of yearly deductions of expenses, deductions for drilling and exploration expenses are available to oil companies in subsequent years.

While after the sale of its assets the appellant was no longer in a situation in which it could claim deductions for drilling and exploration expenses, it had a perfect right to resume active operations and claim in later years. It had not lost its entitlement to such deductions in appropriate circumstances, such entitlement was a valuable asset of enduring value involving substantial potential benefits just as some other kinds of tax losses. While the realization of actual benefits from such assets is subject to restrictions and conditions, they are commonly bought and sold through the acquisition of the shares of the company holding them. This is some-

cessionnaire. Selon cette interprétation, si le cessionnaire était une compagnie pétrolière existante il obtiendrait, sans contre-partie, ce droit précieux en plus des biens cédés. Dans la présente affaire, on a vendu les actions de l'appelante après l'entrée en vigueur de la modification de 1962 mais, de l'aveu même du Ministre, les acheteurs auraient perdu l'objet de leur achat même s'ils avaient acheté les actions avant l'entrée en vigueur de la modification. En ayant à l'esprit la présomption contre la rétroactivité, peut-on interpréter la loi présentement en cause de façon à éviter ce résultat injuste?

La disposition visant l'application de la loi modificatrice de 1962 prévoit que le paragraphe en question s'appliquera aux années d'imposition 1962 et suivantes. Selon le Ministre, cela signifie que les cotisations pour ces années-là doivent s'effectuer en conformité du droit modifié par la nouvelle loi. Je ne nie pas que ce soit ordinairement l'effet d'un texte législatif ainsi libellé. Toutefois, en raison de la nature du système de déductions dont il s'agit, je ne vois pas pourquoi on ne pourrait pas l'interpréter différemment à l'égard des dispositions en cause, c'est-à-dire celles qui portent sur l'effet juridique des contrats conclus en relation avec ce système de déductions à faire pendant plusieurs années à venir. A cause du risque particulier propre à l'exploration et au forage visant à découvrir du pétrole, le Parlement s'est écarté du principe de la déduction annuelle des dépenses en autorisant les compagnies pétrolières à déduire au cours des années subséquentes leurs dépenses de forage et d'exploration.

Bien qu'après la vente de son actif l'appelante ne fût plus en mesure de se prévaloir du droit de déduire ses dépenses de forage et d'exploration, elle conservait néanmoins le droit légitime de reprendre plus tard ses activités et de réclamer alors les déductions. Elle n'avait pas perdu le droit de faire ces déductions dans des circonstances appropriées, et ce droit était un bien précieux de valeur permanente qui comporte d'importants avantages éventuels à l'instar d'autres types de pertes admissibles pour fins fiscales. Bien que la réalisation profitable de semblables actifs soit soumise à des restrictions et conditions, ils sont régu-

thing which appears from the facts of the case and of which we should anyway take judicial notice. It is not something of which Parliament may be deemed to have been unaware in passing the legislation. Due to the nature of the entitlement to future deductions for drilling and exploration expenses, it should not be presumed that a company holding such an asset will not seek to realize its value in later years just because, at one point, it has sold or otherwise disposed of its properties. The 1962 amendment should not be looked upon purely as conferring the right to claim deductions upon the purchaser of the properties. There is a correlative withdrawing of this right from the vendor which Parliament's so-called liberality effected at the same time. Thus the true nature of the operation is a transfer of the entitlement to the deductions.

I cannot agree that our present income tax legislation should be construed on the basis of the special rules that were developed in the days when the taxation statutes were yearly drawn up in the Ways and Means Committee. Our *Income Tax Act* is permanent legislation and we are here dealing with incentive provisions, that is a system of deductions designed to encourage investment. It is true that it is within Parliament's power to breach the promises of special treatment on the faith of which investments have been made. There is however a strong presumption against any intention to do this. In the present case, there was clearly no such intention. The scheme of deductions was not repealed. Appellant would admittedly be entitled to the deductions were it not for the fact that, some years previously, it transferred its property to another corporation, as it could lawfully do without prejudicing its entitlement to the deductions. At that time, this transfer did not carry the right to the deductions although it would now do so. Under such circumstances, it does not appear to me that the application provision may properly be read as making the new law applicable to a contract previously executed so as to change its effect especially when such change is nothing but an entirely unjustified forfeiture or confiscation of valuable rights.

lièrement achetés et vendus par l'acquisition des actions de la compagnie qui les possède. Les faits de l'espèce le démontrent et, de toute façon, j'estime que nous devons en prendre connaissance d'office. Il ne s'agit pas d'une situation dont le Parlement pouvait ignorer l'existence lors de l'adoption du texte législatif. Vu le caractère du droit aux déductions futures pour dépenses de forage et d'exploration, on ne doit pas présumer qu'une compagnie qui possède un tel actif ne cherchera pas plus tard à le réaliser, uniquement parce qu'à une certaine époque, elle a vendu ses biens ou en a autrement disposé. On ne doit pas interpréter la modification de 1962 comme ayant pour seul effet de donner à l'acquéreur le droit aux déductions. La prétendue générosité du Parlement comporte également le retrait corrélatif de ce droit au vendeur. La disposition a donc pour but véritable d'effectuer le transfert du droit aux déductions.

Je ne peux partager l'avis selon lequel nos présentes lois fiscales doivent être interprétées suivant les règles spéciales établies à l'époque où le Comité des voies et moyens rédigeait annuellement les lois fiscales. Notre *Loi de l'impôt sur le revenu* est une loi permanente, et nous sommes aux prises ici en présence de dispositions visant à encourager les investissements par l'instauration d'un régime de déductions. Il est vrai que le Parlement a le pouvoir de briser les promesses de traitement privilégié sur la foi desquelles des investissements ont été faits. Toutefois, une forte présomption existe à l'encontre d'une intention semblable. En l'espèce, il n'y a trace d'aucune telle intention. Le régime de déduction n'a pas été abrogé. De toute évidence, l'appelante aurait droit aux déductions si elle n'avait, quelques années auparavant, transféré ses biens à une autre corporation comme elle pouvait légitimement le faire sans porter atteinte à son droit de se prévaloir des déductions. A cette époque-là, ce transfert n'emportait pas celui du droit aux déductions, bien qu'aujourd'hui il en soit autrement. Dans de telles circonstances, j'estime qu'on ne peut, à bon droit, interpréter la disposition visant l'application de la nouvelle loi comme signifiant qu'elle est applicable à un contrat déjà exécuté, de façon à en modifier l'effet, surtout lorsqu'une telle modification ne constitue rien de moins qu'une confiscation entièrement injustifiée de droits précieux.

Concerning the decision of this Court in *Acme Village School District v. Steele-Smith*[10], I would point out that the situation was quite different. The dispute was between a school teacher and a school board which was his employer. The agreement between them provided for termination by either party giving thirty days notice in writing to the other. Subsequent to the making of the agreement, the Legislature amended the section of the *School Act* contemplating the termination of teachers' engagements by such notice. The amendment provided that except in the month of June, no such notice shall be given by a Board without the approval of an inspector previously obtained. This Court held that the teacher was entitled to the benefit of the amendment. Lamont J. said, speaking for the majority (at p. 52):

> Considering the nature and scope of the Act and the control over the agreement between teacher and Board retained by the Minister, and considering also that the mischief for which the legislature was providing a remedy was a presently existing evil which the legislature proposed to cure by making the right of either party to terminate the agreement depend upon the consent of the inspector, I am of opinion that sufficient has been shewn to rebut the presumption that the section was intended only to be prospective in its operation.

With deference for those who hold a different view, it seems to me that if a similar reasoning is applied to the contract and legislation in question herein, the result ought to be that the intention of Parliament in effecting the legislative change in 1962 was to facilitate the transfer of the right to deductions, not to alter the result of past contracts so as to effect a forfeiture of the rights of those oil companies that had previously transferred their properties under conditions that did not involve a transfer of their entitlement to the transferee. In my view, the words used by Parliament do not compel us to reach the result contended for by the Minister. That this is a matter of taxation in which it is said no resort to equity can be had, makes in my view no difference.

I would allow the appeal with costs throughout to the appellant, reverse the judgments of the

[10] [1933] S.C.R. 47.

Quant à l'arrêt rendu par cette Cour dans *Acme Village School District c. Steele-Smith*[10], je tiens à souligner que la situation était très différente. Le litige était entre un enseignant et son employeur, une commission scolaire. La convention qui les liait stipulait que l'une ou l'autre des parties pouvait y mettre fin par préavis de trente jours. Après la conclusion de la convention, la législature a modifié l'article du *School Act* relatif à la cessation d'emploi d'un enseignant suite à un tel préavis. Selon la modification, le préavis ne pouvait plus être donné, sauf au mois de juin, sans l'accord préalable d'un inspecteur. Cette Cour a statué que l'enseignant était autorisé à se prévaloir de la modification. Le juge Lamont, au nom de la majorité, s'est exprimé ainsi (à la p. 52):

> [TRADUCTION] Compte tenu du caractère et de la portée de la Loi et du contrôle que le Ministre a conservé sur la convention liant l'enseignant et la Commission, et compte tenu également du fait que le redressement apporté par la Législature s'adresse à un problème actuel que cette dernière se propose de régler en subordonnant au consentement d'un inspecteur le droit de chacune des parties de mettre fin à la convention, j'estime qu'il y en a assez pour réfuter la présomption que l'article ne doit produire son effet que dans l'avenir.

Avec respect pour l'opinion contraire, je suis d'avis que l'application de ce raisonnement au contrat et à la Loi en question incite plutôt à conclure que l'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire. A mon avis, les mots employés par le Parlement ne nous obligent pas à conclure dans le sens que le voudrait le Ministre. Selon moi, il importe peu qu'il s'agisse en l'espèce d'une question de fiscalité à l'égard de laquelle aucun recours en *equity* ne peut être exercé.

J'accueillerais le pourvoi avec dépens dans toutes les cours en faveur de l'appelante, j'infirme-

[10] [1933] R.C.S. 47.

Federal Court at trial and on appeal, and restore the judgment of the Tax Appeal Board.

Appeal dismissed with costs, PIGEON *and* DE GRANDPRÉ JJ. *dissenting.*

Solicitors for the appellant: McDonald & Hayden, Toronto.

Solicitors for the respondent: D. S. Maxwell, Ottawa.

rais les jugements rendus par la Cour fédérale en première instance et en appel, et je rétablirais le jugement de la Commission d'appel de l'impôt.

Pourvoi rejeté avec dépens, les juges PIGEON *et* DE GRANDPRÉ *étant dissidents.*

Procureurs de l'appelante: McDonald & Hayden, Toronto.

Procureur de l'intimé: D. S. Maxwell, Ottawa.

TAB 5

RE FRONTIER CONSTRUCTION & DEVELOPMENT LTD.

British Columbia Supreme Court, in bankruptcy, Dryer, J.
May 26, 1970.

D. F. McEwen, for applicant, trustee in bankruptcy.
J. E. Hall, for respondent, Atco Industries Ltd.

DRYER, J.:—On September 25, 1967, Atco Industries Limited, as lessor, entered into what is conceded to be a conditional sales contract with Frontier Construction & Development Limited, as lessee, covering a "10 x 52 diner unit, serial number D 15221300". This contract was not registered with the Registrar General within the period limited by s. 6 of the *Conditional Sales Act*, 1961 (B.C.), c. 9.

On May 13, 1968, Frontier Construction & Development Ltd. made a proposal under the *Bankruptcy Act*, R.S.C. 1952, c. 14, which was approved by the Court on May 29, 1968, and pursuant thereto a debenture was granted from that company to a trustee in bankruptcy who is the applicant in these proceedings. The debenture was registered on July 31, 1968. On June 25, 1969, one Harold S. Sigurdson was appointed receiver pursuant to the debenture. At that time he was in possession of the diner unit pursuant to a prior debenture and has since held it under the debenture of May 29, 1968.

On September 4, 1969, Atco Industries Ltd. obtained an order under s. 10(1) of the *Conditional Sales Act, 1961*, from the Registrar General in the following terms:

UPON READING the Affidavit of John Jeffrey dated the 11th day of August, A.D. 1969, and filed.

AND upon being satisfied that it is just and equitable to grant the application herein.

IT IS ORDERED that the time for registering the Conditional Sale Contract dated the 25th day of September. A.D. 1967 from Atco Industries Ltd. as Lessor to Frontier Construction and Development Limited as Lessee, is hereby extended to the 14th day of September, A.D. 1969 provided that the said extension of time hereby Ordered shall be without prejudice to any third party who has in the meantime acquired title to all or some of the personal Chattels either by purchase and possession or by registration of a bona fide Conditional Bill of Sale thereof, within the time limit for registration by this Act.

This order was made *ex parte.*

Section 10(2) of the *Conditional Sales Act, 1961* reads as follows:

> 10(2) An order under subsection (1) shall be without prejudice to the rights of any third party who has in the meantime acquired title to all or some of the same goods, either by purchase and possession or by registration of a bona fide bill of sale or of a conditional sale thereof, within the time limited for registration by this Act or by the *Conditional Sales Act* applicable thereto and previously in force. [rep. & sub. 1962, c. 12, s. 4(*b*)]

The applicant now moves the Court for a "Declaration that the registration of the Conditional Sales Agreement covering a 10 x 52 Diner Unit, Serial Number D15221300, on September 4th, 1969 is null and void and that the Trustee in Bankruptcy in the matter of the proposal of Frontier Construction & Development Ltd. is entitled to sell the said 10 x 52 Diner Unit, Serial Number D15221300".

Counsel for the applicant contends, first, that the Legislature must have intended the persons protected by s. 10(2) of the *Conditional Sales Act, 1961*, to include all those set forth in s. 15 of the Act and consequently to include a trustee in bankruptcy and, secondly, that in any event the applicant in this case acquired title to the diner unit "by purchase and possession".

As to the first of these contentions, I feel that if the Legislature had so intended, it could easily and would have said so, and I therefore reject it.

I turn now to the second contention. Counsel for Atco Industries Ltd. contends that the manner in which the trustee in bankruptcy obtained title does not fall within the meaning of the word "purchase" in s. 10(2). We must, therefore, consider the meaning of that word. I have looked at a number of dictionaries and those portions of their definitions of this word which I consider to be significant are as follows:

Funk & Wagnalls:

> To obtain as one's own by paying, or promising to pay, a price; buy; (in law) To acquire (property) by one's own act or agreement, as distinguished from the act or mere operation of law.

The Shorter Oxford English Dictionary:

> The act or action of purchasing; specifically, acquisition by payment of money or an equivalent; buying; (in law) The acquirement of property by one's personal action, as distinguished from inheritance.

The Concise Oxford Dictionary:

> Buying; . . . (law) acquisition of property by one's personal action, not by inheritance.

Wharton's Law Lexicon, 8th ed., p. 598:

> In its popular sense, an acquisition of land, obtained by way of bargain and sale, for money or some other valuable consideration; in its legal acceptance, an acquisition of land in any lawful manner, other than by descent, or the mere act of law, and including escheat, occupancy, prescription, forfeiture and alienation.

Black's Law Dictionary, 4th ed., p. 1399:

> Transmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration . . . In a technical and broader meaning relative to land generally means the acquisition of real estate by any means whatever except by descent.

The Dictionary of English Law by Earl Jowitt at p. 1445 says:

> In its popular sense "purchase" means an acquisition of land, obtained by way of sale, for money or some other valuable consideration. In its strict legal acceptation, however, it means an acquisition of land in any lawful manner other than by descent or the mere act of law, and includes escheat, occupancy, prescription, forfeiture and alienation. Generally, it is possession to which a man comes not by title of descent (Co. Litt. 18b).
>
> Purchase is used in law not only in the popular sense of buying, but also in a technical sense to denote that a person has acquired land by the lawful act of himself or another, *e.g.*, by conveyance, gift or devise, as opposed to title by act of the law, such as descent, dower, curtesy, etc., and to title by wrong, as in the case of disseisin (Co. Litt. 3b, 18b).

Stroud's Judicial Dictionary, 3rd ed., p. 2402 defines "purchase" in part as follows:

> 1. Speaking technically, a person acquires by "words of purchase" and is a "purchaser" when he obtains title in any other mode than by descent or devolution of law; a devisee under a will is accordingly a purchaser in law.
>
> 2. But in the Statute of Elizabeth (27 Eliz., c. 4), s. 2, relating to fraudulent conveyances as against those "as have purchased, or shall afterwards purchase" lands, tenements, and hereditaments, "the word 'purchase,' of course, refers to cases of selling and

> purchasing in the ordinary and vulgar acceptance of the word, and not in the technical sense of any person who obtains lands otherwise than by descent." A "purchaser" under this statute must be "a purchaser for money or other valuable consideration".

These definitions distinguish between the popular sense of the word and its strict legal sense or technical sense. I think it significant that the technical meaning seems to relate to land.

In a number of decisions the word has been given by the Courts a meaning close to what is referred to above as its "popular sense" even though those cases dealt with interests in real property.

In *Commissioners of Inland Revenue v. Gribble et al.*, [1913] 3 K.B. 212, the English Court of Appeal dealt with the meaning of the word "purchased" in the *Finance (1909-10) Act, 1910*, of Great Britain. At p. 218 Buckley, L.J., said:

> "Purchaser" may, as it seems to me, mean any one of four things. First, it may bear what has been called the vulgar or commercial meaning; purchaser may mean a buyer for money. Secondly, it may include also a person who becomes a purchaser for money's worth, which would include the case of an exchange. Thirdly, it may mean a purchaser for valuable consideration, which need not be money or money's worth, but may be, say, a covenant, or the consideration of marriage. Fourthly, it may bear that which in the language of real property lawyers is its technical meaning, namely, a person who does not take by descent.

and went on to say that, in the section then under review, the word "purchased" meant "acquired for value". Cozens-Hardy, M.R., said at p. 217:

> None of those cases satisfies me that we ought to put any other meaning on the word "purchased" in this section than that which is the ordinary and commercial and businesslike meaning of the word, and I decline to incorporate in this section what I have ventured to call the technicalities of real property law.

In *Hollingsworth v. Lee*, [1949] V.L.R. 140 at p. 144, Barry, J., held that the phrase "by purchase" in the National Security (Landlord and Tenant) Regulations of Australia "has its popular meaning and envisages a person acquiring the dwelling-house by way of bargain and sale for money or other valuable consideration . . ." and refused to give it "its technical legal meaning . . . as referring to the acquisition of land in any lawful manner other than by descent or the mere act of law".

In *H. L. Bolton (Engineering) Co., Ltd. v. T. J. Graham & Sons, Ltd.*, [1956] 3 All E.R. 624 at p. 628, Denning, L.J., held that the word "purchased" in the British *Landlord and Tenant*

Act, 1954, "has its popular meaning of buying for money, and not the technical legal meaning of acquisition otherwise than by descent or escheat": see also *Frederick Lawrence, Ltd. v. Freeman Hardy & Willis, Ltd.*, [1959] 3 All E.R. 77, and *Knight Sugar Co., Ltd. v. Beatty Brothers Ltd.*, [1923] 4 D.L.R. 743, [1923] 3 W.W.R. 1120.

In the case at bar we are dealing with chattels under the *Conditional Sales Act, 1961* and consequently I feel there is even greater reason for holding that the word "purchase" in s. 10(2) should be given the "ordinary and commercial and businesslike meaning of the word", *viz.*, "acquisition by payment of money or an equivalent" and refusing to apply to it "the technicalities of real property law".

Applying this definition, it seems to me that the trustee in bankruptcy did not acquire title in such a way as to enable him to invoke s-s. (2) of s. 10 of the *Conditional Sales Act, 1961* and I refuse to make the declaration sought.

Costs will follow the event.

Application dismissed.

TAB 6

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. 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. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> 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.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88). 27

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up 28

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

TAB 7

11 MAR 2021

Practice and Procedure Before Administrative Tribunals

CARSWELL

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17.2 — STANDARD AND BALANCE OF PROOF

The concept of "standard of proof" refers simply to how convinced one must be that a certain fact exists. "Burden of proof" refers to who bears the burden of establishing a fact to that level of satisfaction.

17.2(a) Standard of Proof

The concept of "standard of proof" deals with whether something has been adequately proven.

In considering that issue an agency should not look at evidence or portions thereof out of context but consider it as a whole, in context and weighed accordingly.[89]

While legislation may provide for something else, at common law there are only two standards of proof.[90] The first, which is the standard applicable in civil proceedings, is proof on a balance of probabilities which requires that in order to find that a fact exists, the decision-maker be more convinced of the existence of that fact than not.[91] The second, which is the standard used in criminal proceedings, is proof beyond a reasonable doubt according to which a decision-maker cannot find a fact unless he or she has no reasonable doubt that that fact exists.[92] (I will discuss the situation where legislation expressly sets out a different standard of proof in civil proceedings at the end of this section.)

To the extent that most proceedings before administrative agencies are civil (as opposed to criminal) in nature, the burden of proof is the civil burden of "balance of probabilities" (as opposed to the criminal standard).[93]

This is true even if the agency is attempting to establish a fact that relates to, or establishes a crime.[94] For example, criminal injury compensation agencies generally have to establish, as part of their mandate, that a crime was committed. Notwithstanding the necessity of proving the commission of a crime, the existence of this crime need only be established on the civil standard.[95]

In layman's language it is sometimes suggested that the more serious the consequences of a finding, the more certain one must be — although one does not have to find it established beyond a reasonable doubt. This implies that there is a shifting standard within the civil standard of proof where some facts require more certainty than others. This notion of a "flexible" standard of civil proof, or of degrees of proof within the civil standard has come under increasing criticism from the courts.[96] Rather, the Courts prefer to speak of the cogency of the evidence required to prove a fact, rather than the certainty with which the fact has to be proven. Thus, while insisting that there is only one standard of proof in civil proceedings which does not fluctuate regardless of the seriousness of the matter, the Courts also insist that the more serious the matter, the more cogent the evidence must be — that is to say, the better the quality of the evidence must be.[97]

The explanation given respecting this civil standard in matters of significant consequence can be tricky. The general judicial approach is to require that a finding be supported by "clear, cogent and convincing" evidence in order to meet the required standard of proof. In *Law Society of Upper Canada v. Neinstein*, 2007 CarswellOnt 1560, 2007 WL845573 (Div. Ct.), the Divisional Court discussed this in some detail. In that case the Court re-affirmed that as proceedings before a law society disciplinary panel as not criminal the standard of proof was the civil standard of a balance of probabilities. It also noted that "given the seriousness of the allegations of professional misconduct and the possible consequences for the respondent, the allegations had to be proven

by clear, convincing and cogent evidence. . ."

The Court attempted to delineate what this meant by rejecting the idea that the standard of proof rises with the gravity of the allegation. Rather, it was a question of the assessment or care to be taken in scrutinizing the evidence tendered. Referring to Gavin Mackenzie's *Lawyers and Ethics: Professional Responsibility and Discipline* the Court noted that when Mr. Mackenzie spoke of a rising standard of proof what the author meant was that that the trier of fact must scrutinize the evidence with great care when the allegations are serious.

> The significance of the requirement of clear, convincing and cogent evidence is well-explained in Linda R. Rothstein, Robert A. Centra and Eric Adams, "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof" . . . . While the civil standard of balance of probabilities applies in the professional discipline context, the authors say,
>
> > . . . probability depends on the circumstances, and where there are serious consequences at issue, a higher or more rigorous evidentiary standard must be met for the fact to be found probable. This more rigorous approach to the evidence involves a qualitative assessment of the evidence — for "cogency" and "persuasiveness" — in determining whether the fact in question has been demonstrated to be probable.

The Divisional Court's decision in *Neinstein* was reversed on appeal to the Court of Appeal — *Law Society of Upper Canada v. Neinstein*, 2010 CarswellOnt 1459, 2010 ONCA 193 (Ont. C.A.). However, the appeal did not turn on, or discuss the issue or meaning of standard of proof.

The approach of referring to the quality of evidence is very much in the standard stream of judicial decisions concerning the standard of proof in civil cases with significant consequences. Thus, in *Stetler v. Ontario (Agriculture, Food & Rural Affairs Appeal Tribunal)*, 2005 CarswellOnt 2877, 200 O.A.C. 209, 76 O.R. (3d) 321, 36 Admin. L.R. (4th) 212 (Ont. C.A.) the Ontario Court of Appeal stated:

> There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt. The well-established standard articulated in *Bernstein* and numerous subsequent cases is an evidential standard that speaks to the quality of evidence required to prove allegations of misconduct or incompetence against a professional. Thus, within the administrative context, it is accepted that strong and unequivocal evidence within the civil standard of proof is required where either the issues, or the consequences for the individual, are very serious . . . .

On a practical basis I suggest that agencies avoid discussions of whether the burden of proof in matters of significant consequence is a case of a "higher" standard within the overall balance of probabilities or whether it is a case of demanding greater scrutiny of evidence. Presumably, the only effect of subjecting evidence to a greater degree of scrutiny and ensuring that it is clear, convincing and cogent will be to increase the degree of that evidence's reliability and increase the confidence of the agency in the existence of whatever fact that evidence tends to indicate. It strikes me very much as using different words to mean the same thing. In all cases the agency, in order to find that something has been proven, must be satisfied that the thing was more likely than not. There are obvious degrees of certainty within this broad category falling below the criminal standard of being satisfied beyond a reasonable doubt. In a number cases a person may be satisfied that some fact is more likely than not but in some of those be more certain of the fact than in others — without in any case being satisfied beyond a reasonable doubt. To say either that on the evidence one has a high certainty in the likelihood of a fact, or that the evidence on which a factual finding was based was particularly scrutinized and was found to be "clear, convincing and cogent" seems to be saying very much the same thing. It appears to me to be very difficult for an agency to reach a high degree of certainty without clear, convincing and cogent evidence. In each case the result is a statement of greater certainty or comfort level in the finding. Having said that, in order to avoid reviews based on the technicalities of language, where the issue of the civil standard of proof is at issue in agency proceedings of significant consequence, the prudent agency, having ensured a strong evidentiary base for its findings should refer to those findings being based on "clear, convincing and cogent evidence" rather than risking a judicial review by stating that the evidence was such that the agency is well satisfied, or has a high degree of

comfort that something was more likely than not.[98]

However, if the proceedings before the agency are criminal in nature, then the standard of proof is the criminal standard. The Supreme Court of Canada has indicated a proceeding will be "criminal" in nature if:

> — it is aimed at maintaining public order (rather than regulating an industry for example); or
>
> — it carries a "true penal" consequence (imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline).[99]

The above discussion focuses on the common law respecting the standard of proof. As noted above in civil proceedings the applicable standard of proof is the civil standard of belief on the balance of probabilities. However, as indicated at the beginning of this section it is open to a legislature to change the standard of proof required in civil proceedings under a particular statute. Thus, in *Jacobs v. Ottawa Police Service*, 2016 CarswellOnt 7339, 2016 ONCA 345, 400 D.L.R. (4th) 148 (Ont. C.A.) the Ontario Court of Appeal held that section 84 of the Ontario *Police Services Act* required that in police disciplinary matters under that *Act* misconduct by a police officer had to be proven on more than the civilian standard of proof on the balance of probabilities. Rather the section required that misconduct had to be proven on the higher standard of "clear and convincing evidence". The Ontario Court of Appeal held that legislation could specify the standard of proof for a particular statute (as per *Stetler v. Ontario (Agriculture, Food & Rural Affairs Appeal Tribunal)*, 2005 CarswellOnt 2877, [2005] O.J. No. 2817, 200 O.A.C. 209, 36 Admin. L.R. (4th) 212, 76 O.R. (3d) 321 (Ont. C.A.)) and that the Supreme Court of Canada in *Penner v. Niagara Regional Police Services Board*, 2013 CarswellOnt 3743, 2013 SCC 19, [2013] 2 S.C.R. 125, 356 D.L.R. (4th) 595 (S.C.C.) had directed that this is exactly what the Ontario Legislature had done in section 84. The Court of Appeal held that it was bound by the Supreme Court decision in *Penner*. The Court of Appeal thus had rejected the argument that "clear and convincing evidence" only described the quality of evidence that was required to meet the balance of probabilities standard in professional disciplinary matters.[100]

In *Spottiswood v. Worksafe BC*, 2018 CarswellBC 1211, 2018 BCSC 809 (B.C.S.C.), B.C.'s Workers Compensation Act contains a direction that changes the common law standard of proof in favour of worker applicants. Section 250(4) directs that where the evidence supporting different findings on an issue is evenly weighted the Workers' Compensation Appeal Tribunal must resolve the issue in a manner that favours the worker:

> 250 (4) If the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

The B.C. Supreme Court held that the direction in section 250 only applies when the evidence is evenly weighted. Furthermore, in the absence of the Tribunal's evidentiary findings being patently unreasonable (the relevant standard of review under section 58 of the *Administrative Tribunals Act*) it is the Tribunal which determines when the evidence is evenly weighted as it is not the role of the court on a judicial review to reweigh the evidence.

> 63 WCAT responds that the argument under this ground is misconceived. It submits that the requirement in s. 250(4) of the Act only applies if WCAT itself has made a finding that the evidence is evenly weighted, and it has not done so here. It is not for this Court to weigh the evidence anew and come to such a conclusion, where the WCAT panel has not done so. WCAT cites in this regard Decision No. WCAT-2004-04388-AD, 2012 CarswellBC 1646, 2012 BCSC 831 (B.C. S.C. [In Chambers]) [hereinafter *Vandale*], where Griffin J. (as she then was) stated as follows:
>
> > [91] WCAT points out that s. 250(4) only applies to evidence, not to contrasting decisions, and so it argues that the Petitioner's reliance on this section is misguided. It submits that the WCAT panel must first conclude that the evidence on an issue is evenly weighted, before the section applies, and since that did not happen here, the section is inapplicable.

> [92] I agree that the fact that the Doogan Decision and the WCAT Original Decision may have interpreted the medical evidence differently does not give rise to the application of s. 250(4) of the Act, especially where the WCAT Original Decision does not suggest that the evidence is evenly weighted. As suggested in *Basura v. British Columbia (Workers' Compensation Board)*, 2005 CarswellBC 622, 2005 BCSC 407 at paras. 34-36, this court's task is not to engage in a re-weighing of the evidence and a hindsight application of s. 250(4). Assuming that WCAT could weigh the evidence (and leaving aside the implications of the third argument regarding the binding findings of fact made by the Appeal Division Decision which I will address below), there was no basis for concluding here that WCAT found the evidence to be evenly weighted or was patently unreasonable in failing to so find.

64 As in *Vandale*, there was no finding by the WCAT panel in this case that the evidence was evenly weighted, nor even an allegation by Ms. Spottiswood that it was patently unreasonable for the WCAT panel not to have made such a finding. I therefore agree with WCAT that s. 250(4) is inapplicable here.

FOOTNOTES

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89 In *Barua v. Canada (Minister of Citizenship & Immigration)*, 2012 CarswellNat 95, 2012 FC 59 the Federal Court stated in the context of a decision by the Immigration and Refugee Board:

> "1 This Court has stated in a number of cases that the Refugee Protection Division of the Immigration and Refugee Board [Board] must not ignore relevant evidence nor should it "dissect" the documentary evidence and use only specific portions in isolation to confirm one's point of view. Instead, the evidence must read as a whole, in context, and weighed accordingly (*King v. Canada (Minister of Citizenship and Immigration)*, 2005 CarswellNat 1574, 2005 FC 774; *Bacchus v. Canada (Minister of Citizenship and Immigration)*, 2010 CarswellNat 1652, 2010 FC 616; *Myle v. Canada (Minister of Citizenship and Immigration)*, 2006 CarswellNat 2132, 2006 FC 871, 296 FTR 307)."

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90 See *Stetler v. Agriculture, Food and Rural Affairs Appeal Tribunal*, 2005 CarswellOnt 2877 (Ont. C.A.):

> There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt.

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91 Or, as put in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Butterworths, 1992) at p. 143: Simply put, the trier of fact must find that "the existence of the contested fact is more probable than its non-existence" Conversely, where a party must prove the negative of an issue, the proponent must prove its absence is more probable than its existence.Or as put by Duff J. in *Clark v. R.*, [1921] 59 D.L.R. 121 (S.C.C.) at p. 126:

> Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to she that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts.See also *Newfoundland & Labrador v. Vinland Resources Ltd.*, 2006 CarswellNfld 225, 2006 NLTD 122 (Nfld. S.C.) where the Newfoundland and Labrador Mineral Rights Adjudication Board, in

applying the civil standard of proof on a balance of probabilities erred in requiring "conclusive evidence".

The appropriate standard of proof was proof on the balance of probabilities, as identified by the Board. However, by its use of the words "conclusive evidence" and "conclusively show" I conclude the Board applied a higher standard than the balance of probabilities. It applied a standard closer to that of the criminal standard of proof beyond a reasonable doubt.

In *Hercegi v. Canada (Minister of Citizenship & Immigration)*, 2012 CarswellNat 408, 2012 FC 250 the Federal Court found that the amount of evidence required by the Immigration and Refugee Board to be tendered to establish a fact (which amounts to an issue of standard of proof) to have been unreasonable. The claimants were Roma seeking refugee status before the Immigration and Refugee Board. They claimed to have been beaten on several occasions by "skinheads". Photographs attesting to large bruising on the body of some of the applicants were submitted. There were scars and missing teeth. Death certificates were produced attesting to the death of two babies — one while in still in the womb when the mother was beaten, the other in a melee during an attack. Evidence was given as to the complaints filed with the police authorities and the police refusal to investigate or document the complaints. There was evidence that the police will not document complaints. The Court found that the Board's insistence on further documentation to back up the evidence given was unreasonable.

3 I will mention the insistence of the Board Member to have further, and yet further, documentation to back up some of the evidence given by the claimants. They claim they were beaten on several occasions by "skinheads". Photographs attest to large bruising on the body of some of the applicants. There are scars and missing teeth. Two babies died — one while still in the womb when the mother was struck by several blows, the other in a melee during an attack. Death certificates were produced. The Applicants gave evidence as to complaints that they made to police authorities and the refusal of the police to investigate or even document the complaints. There is evidence that the Hungarian police will not document complaints by Roma. The insistence by the Board Member for yet further documentation was unreasonable.

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92 The criminal balance was explained by the Supreme Court of Canada in *R. v. Starr* (2000), 2000 CarswellMan 449, 190 D.L.R. (4th) 591, 174 C.C.C. (3d) 449 (S.C.C.) as follows:

The criminal standard of proof has a special significance unique to the legal process. It is an exacting standard of proof rarely encountered in everyday life, and there is no universally intelligible illustration of the concept, such as the scales of justice with respect to the balance of probabilities standard. Unlike absolute certainty or the balance of probabilities, reasonable doubt is not an easily quantifiable standard. It cannot be measured or described by analogy. It must be explained. However, precisely because it is not quantifiable, it is difficult to explain. In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in Lifchus as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof

beyond a reasonable doubt.

Earlier, in *R. v. Lifchus* (1997), 150 D.L.R. (4 th) 733, 1957 CarswellOnt 139, 118 C.C.C. 1 (S.C.C.) the Supreme Court of Canada had laid down the following guidelines as to what a trial judge should instruct a jury on the meaning of "reasonable doubt":

> Perhaps a brief summary of what the definition should and should not contain may be helpful.
>
> It should be explained that:
>
> the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence; the burden of proof rests on the prosecution throughout the trial and never shifts to the accused; a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense; it is logically connected to the evidence or absence of evidence; it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and more is required than proof that the accused is probably guilty — a jury which concludes only that the accused is probably guilty must acquit.

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93 In *P.S.A.C. v. Canada Post*, 2011 CarswellNat 4581, 2011 SCC 57 the Supreme Court of Canada adopted the dissenting reasons of Justice Evans in the Court of Appeal. Justice Evans had stated (among other things) that subject to contrary legislative direction the standard of proof in civil proceedings (including proceedings before human rights tribunals) is the civil balance of probabilities (which means that that which is sought to be proven must be shown to be more likely than not). Furthermore, where a decision-maker expressly states the correct standard of proof it is to be presumed that that was the standard being applied. Similarly, if the decision-maker does not express a particular standard of proof the presumption is also that the correct standard was applied. Where the presumption is established the burden is on the person arguing that the incorrect standard was applied to rebut the presumption. The below quotations are from Justice Evans' reasons in the Court of Appeal decision. (*P.S.A.C. v. Canada Post Corp.*, 2010 CarswellNat 416, 2010 FCA 56 (Fed. C.A.)).

> "205 The relevant law on this issue is clear and not in dispute in this appeal. Complainants before the Canadian Human Rights Tribunal have the *burden* of proving that the respondent has *prima facie* discriminated against them contrary to the Act: see, for example, *P.S.A.C. v. Canada (Department of National Defence)*, 1996 CarswellNat 2593, [1996] 3 F.C. 789 (Fed. C.A.) at para. 33 ("*Department of National Defence*"). Absent some special legislation, a balance of probabilities is the *standard of proof* applicable to civil proceedings in Canada: *C. (R.) v. McDougall*, 2008 CarswellBC 2041, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.) ("*McDougall*"). "Civil proceedings" include proceedings before human rights tribunals: *Department of National Defence* at para. 33.
>
> 206 After noting that there was some judicial authority for the proposition that the civil standard of proof varies according to the seriousness of the outcome for the parties and the importance of the interests at stake, Justice Rothstein said in *McDougall* (at para. 44):
>
> > In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.
>
> In addition, he noted (at para. 54):

> Where the trial judge expressly states the correct standard of proof, it will be presumed that it was being applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied.
>
> I take it that, like the standard of proof itself, this presumption applies to decisions of the Canadian Human Rights Tribunal."

See, in illustration, *Sihota v. British Columbia (Superintendent of Motor Vehicles)*, 2008 CarswellBC 608, 2008 BCSC 311 (B.C.S.C.). In that case an Adjudicator, acting under the Motor Vehicle Act, was reviewing an "Administrative Driving Prohibition" issued by a police officer against a person for driving with a blood alcohol concentration over .08. The applicable standard of proof was the civil standard. "The adjudicator must be satisfied that it is more probable than not that the person driving the vehicle had a level of alcohol in his blood in excess of 80 milligrams per 100 milligrams."

Contempt may be an exception to this general rule. Because of the serious consequences on a finding of contempt, whether the contempt is civil or criminal in nature, the standard of proof is the criminal standard *(Vidéotron Ltée v. Industries Microlec Produits Electroniques Inc.* (1992), 96 D.L.R. (4 th) 377 (S.C.C.) I only say "may" be an exception here, because, except where legislatively altered (as in Ontario) imprisonment is a possible penalty which can be imposed on a finding of contempt, even on a finding of contempt by an agency. This would make even civil contempt criminal in nature.

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94 See *C. (R.) v. McDougall*, 2008 CarswellBC 2041, 2008 SCC 53, [2008] 3 S.C.R. 41, 297 D.L.R. (4th) 193 (S.C.C.) where the Supreme Court of Canada rejected the argument that something more than the civil balance of proof would apply in civil proceedings where criminal or morally blameworthy conduct is alleged:

> "39 I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:
>
> (1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;
>
> (2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;
>
> (3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;
>
> (4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and
>
> (5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.
>
> 40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However,

these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow."

See also *Continental Insurance Co. v. Dalton Cartage Co.*, 1982 CarswellOnt 372, [1982] 1 S.C.R. 164, [1982] S.C.J. No. 116, 131 D.L.R. (3d) 559, 25 C.P.C. 72, 40 N.R. 135 (S.C.C.):

> "11 Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. So this Court decided in *Hanes v. Wawanesa Mut. Ins. Co.*, 1963 CarswellOnt 61, [1963] S.C.R. 154, [1963] 1 C.C.C. 321, 36 D.L.R. (2d) 718. There Ritchie J. canvassed the then existing authorities, including especially the judgment of Lord Denning in *Bater v. Bater*, [1951] P. 35, [1950] 2 All E.R. 458 at 459 (C.A.), and the judgment of Cartwright J. as he then was, in *Smith v. Smith*, 1952 CarswellBC 139, [1952] 2 S.C.R. 312 at 331, [1952] 3 D.L.R. 449, and he concluded as follows (at p. 164 S.C.R.):
>
> > Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the 'balance of probabilities'."

Similarly, see *Nyonzima v. Ontario (Human Rights Tribunal)*, 2012 CarswellOnt 11633, 2012 ONSC 5120 (Ont. Div. Ct.) where the Ontario Divisional Court rejected the argument that the Human Rights Tribunal was required to apply a higher standard of proof when assessing the allegation that a party had committed fraud in its pursuit of its claims. Citing the decision of the Supreme Court of Canada in *F.H. v. McDougall*, [2008] S.C.C. 53, the Court held that there was only one civil standard of proof at common law and that is proof on a balance of probability.

> 7 The applicant submits that the Tribunal erred at law in not applying a higher standard of proof in assessing what she characterizes as an allegation of fraud against her. It did not.
>
> 8 The applicant relies on two decisions primarily, one of Lord Dennings' from 1950 and another one from the Supreme Court of Canada in 1982. Both those decisions are overtaken by the Supreme Court of Canada decision in *F.H. v. McDougall*, [2008] S.C.C. 53. That case holds very clearly that there is only one civil standard of proof at common law and that is proof on a balance of probability.

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95 There are numerous criminal injury compensation judicial decisions to this effect. See, for example, *Flynn v. Nova Scotia (Criminal Injuries Compensation Board)* (1988), 49 D.L.R. (4 th) 619 (N.S. C.A.); *Castel v. Manitoba (Criminal Injuries Compensation Board)* (1978), 1978 CarswellMan 131, 89 D.L.R. (3d) 67 (Man. C.A.); *Morris v. Attorney General (New Brunswick)* (1975), 1975 CarswellNB 220, 63 D.L.R. (3d) 337 (N.B.C.A.).

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96 The United Kingdom House of Lords, in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)*, [2008] UKHL 35, [2008] 3 W.L.R. 1, 2008 WL 2311233 (U.K. H.L.), has, at least in the context of child care proceedings, rejected the notion that the seriousness of the consequences has anything to do with probability. The Lords held that there is merely one civil standard of proof — is the fact more probable than not. Similarly, see the decision of the Judicial Committee of the Privy Council in *Jugnauth v. Raj Direvium Nagaya Ringadoo* (Mauritius) [2008] UKPC 49 (Privy Council), which affirmed

that there is only one civil standard of proof: the balance of probabilities. There was no intermediate standard between the civil and criminal standards.

To the same effect see *C. (R.) v. McDougall*, 2008 CarswellBC 2041, 2008 SCC 53, [2008] 3 S.C.R. 41, 297 D.L.R. (4th) 193 (S.C.C.):

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

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[97] See *Continental Insurance Co. v. Dalton Cartage Co.*, 1982 CarswellOnt 372, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559 (S.C.C.) where Laskin C.J.C. wrote:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. So this Court decided in *Hanes v. Wawanesa Mut. Ins. Co.*, 1963 CarswellOnt 61, [1963] S.C.R. 154, [1963] 1 C.C.C. 321, 36 D.L.R. (2d) 718. There Ritchie J. canvassed the then existing authorities, including specially the judgment of Lord Denning in *Bater v. Bater*, [1951] P. 35, [1950] 2 All E.R. 458 at 459 (C.A.), and the judgment of Cartwright J. as he then was, in *Smith v. Smith*, 1952 CarswellBC 139, [1952] 2 S.C.R. 312 at 331, [1952] 3 D.L.R . 449, and he concluded as follows (at p. 164 S.C.R.):
>
> > Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the 'balance of probabilities'.

It is true that apart from his reference to *Bater v. Bater* and to the *Smith and Smedman* case, Ritchie J. did not himself enlarge on what was involved in proof on a balance of probabilities where conduct such as that included in the two policies herein is concerned. In my opinion, Keith J. in dealing with the burden of proof could properly consider the cogency of the evidence offered to support proof on a balance of probabilities and this is what he did when he referred to proof commensurate with the gravity of the allegations or of the accusation of theft by the temporary driver. There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial Judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in *Bater v. Bater*, supra, as follows:

> It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It

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

I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that proof on a balance of probabilities has been established.

To the same effect see: *Dhawan v. College of Physicians & Surgeons (Nova Scotia)* (1998), 1998 CarswellNS 203, 13 Admin. L.R. (3d) 109 (N.S. C.A.).

> To the same effect see *Stetler v. Agriculture, Food and Rural Affairs Appeal Tribunal,* 2005 CarswellOnt 2877 (Ont. C.A.):
>
> > There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt. The well-established standard articulated in *Bernstein* and numerous subsequent cases is an evidential standard that speaks to the quality of evidence required to prove allegations of misconduct or incompetence against a professional. Thus, within the administrative context, it is accepted that strong and unequivocal evidence within the civil standard of proof is required where either the issues, or the consequences for the individual, are very serious.

Similarly, the Privy Council has noted that under the civil balance of proof the more improbable an asserted fact, the weightier the evidence required to establish that fact. In *Hearing on the Report of the Chief Justice of Gibraltar* (Gibraltar) [2009] UKPC 43 (P.C.) the Judicial Committee stated:

> The Tribunal applied the civil standard of proof according to what it described as the "flexible approach" that "the more improbable the event, the stronger must be the evidence that it did occur" — see *In re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499, per Lord Carswell at paras 23 and 25. That approach is no more than the rational way of determining facts on a balance of probabilities. The more improbable the event the greater the weight of the evidence that must exist before the scales tilt in favour of a finding that the event occurred. . . .

See also *Walsh v. Council for Licensed Practical Nurses,* 2010 CarswellNfld 53, 2010 NLCA 11 (N.L.C.A.) where the Newfoundland and Labrador Court of Appeal affirmed that between the civil standard of proof on the balance of probabilities and the criminal standard of proof beyond a reasonable doubt there is no middle standard of "more than a bare balance of probabilities". Thus, in a professional disciplinary proceeding the standard is a civil standard of the balance of probabilities; however, that evidence must always be clear, convincing and cogent to satisfy that balance.

> 38 The standard of proof enunciated in *C. (R.) v. McDougall,* 2008 CarswellBC 2041, 2008 SCC 53 (S.C.C.), and followed by this Court in a non-professional discipline setting in *Dinn v. Snow,* 2008 CarswellNfld 286, 2008 NLCA 59 (N.L. C.A.), applies to each of these three functions of a professional discipline tribunal (See *Osif v. College of Physicians & Surgeons (Nova Scotia)*, 2009 CarswellNS 139, 2009 NSCA 28 (N.S. C.A.) at paras. 111-112).

> 39 Rothstein J. made it clear that "there is only one standard of proof [in all civil cases] and that is proof on a balance of probabilities" (para. 49) and that "it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence" (para. 45). He went on to emphasize, however, that "in all cases, evidence must be scrutinized with care" (para. 45) and that the evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (para. 46)." (per J. Derek Green, C.J.N.L.)

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98 This Privy Council recognized the frailty of language and the caution that should be taken not to allow form to overrule substance in *Hearing on the Report of the Chief Justice of Gibraltar (Gibraltar)* [2009] UKPC 43 (P.C.), where it noted that:

> The Tribunal applied the civil standard of proof according to what it described as the "flexible approach" that "the more improbable the event, the stronger must be the evidence that it did occur" — see *In re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499, per Lord Carswell at paras 23 and 25. That approach is no more than the rational way of determining facts on a balance of probabilities. The more improbable the event the greater the weight of the evidence that must exist before the scales tilt in favour of a finding that the event occurred. . . .

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99 *Wigglesworth v. R.* (1987), 45 D.L.R. (4 th) 235, 28 Admin. L.R. 294 (S.C.C.). See the discussion as to what constitutes a criminal proceeding earlier in this text in c. 12.29(b).

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100 In *R. v. Bingley*, 2017 CarswellOnt 2406, 2017 SCC 12, [2017] S.C.J. No. 12, 407 D.L.R. (4th) 383 (S.C.C.) the Supreme Court of Canada stated that clear and unambiguous language is required to displace the common law rules of evidence.

> "11 Clear and unambiguous language is required to displace common law rules, including rules of evidence: see *Slaight Communications Inc. v. Davidson*, 1989 CarswellNat 193, [1989] 1 S.C.R. 1038 (S.C.C.), at p. 1077; *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 CarswellOnt 3500, 2003 SCC 42, [2003] 2 S.C.R. 157 (S.C.C.), at para. 39; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 CarswellAlta 790, 2016 SCC 19, [2016] 1 S.C.R. 306 (S.C.C.), at paras. 29-30. The Crown argues that the words "to determine" in s. 254(3.1) are clear enough to do this. I do not agree. Section 254(3.1) calls on the DRE to form an opinion about whether a person is impaired by drug. It does not follow that the opinion will be automatically admissible at trial."

Presumably Parliament could also change the standard of proof in a criminal proceeding. However, it is likely that in a criminal proceeding the requirement to proof guilt beyond a reasonable doubt is guaranteed by section 7 of the *Charter* as an aspect of fundamental justice in criminal proceedings (*R. v. Dunn*, 1999 CarswellOnt 3544, [1999] O.J. No. 5452, 28 C.R. (5th) 295, 44 W.C.B. (2d) 47 (Ont. Gen. Div.): "Those principles of fundamental justice include, in criminal matters, the burden of proof generally resting with the Crown, requirement of proof beyond a reasonable doubt, and both *actus reus* and *mens rea* before there can be findings of guilt."). Any legislation purporting to set a different standard in criminal matters would thus likely have to be justified as a reasonable limit which is demonstrably justified in a free and democratic society.

TAB 8

ESSENTIALS OF
CANADIAN LAW

STATUTORY INTERPRETATION

THIRD EDITION

RUTH SULLIVAN

IRWIN LAW

applying the provision to this applicant would give her a windfall at the expense of other contributors to the fund. Because of the timing of her husband's election, and the choice he made, she would garner the advantages of both the single and the joint plans while avoiding their associated disadvantages. Clearly, the court did not think that this was an appropriate outcome, and it therefore analyzed the problem as a retroactive application of a provision to a past event, the election of a pension plan, rather than an immediate application of a provision to ongoing lives.

7) Presumption against Retrospective Application

a) Overview

Driedger took it for granted that there was a presumption against the retrospective application of legislation, and his position has been accepted by the courts. Initially, however, there were few examples outside the *Charter* context of the presumption being applied. In most cases, legislation attaching new legal effects to past facts was found either to come within one of the exceptions to the presumption (discussed below) or to interfere with vested rights, and its application was denied on that ground.[23]

With the coming into force of the *Charter*, the courts were faced with some novel problems. One significant way in which *Charter* analysis differs from the analysis of ordinary statutes is that subjects cannot claim to have a vested right in *Charter* rights or freedoms. This limitation has thrown a spotlight on the issue of retrospective application.

From the beginning, the courts have held that the *Charter* cannot be applied either retroactively or retrospectively. The *Benner* case offers an excellent overview of judicial thinking in this area.[24] In that case, Iacobucci J wrote:

> The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E.A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264, at pp. 268–69, has offered these concise definitions which I find helpful:
>
> > A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for

23 The courts have rightly recognized that applications which interfere with vested rights are inherently retrospective. See, for example, *Bell Canada v Amtelecom Limited Partnership*, 2015 FCA 126 at para 17.

24 *Benner*, above note 8.

> the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

> The *Charter* does not apply retroactively and this Court has stated on numerous occasions that it cannot apply retrospectively.[25]

Justice Iacobucci points out that in the *Charter* context the presumption against retrospective application is a flexible tool:

> The Court has also rejected a rigid test for determining when a particular application of the *Charter* would be retrospective, preferring to weigh each case in its own factual and legal context, with attention to the nature of the particular *Charter* right at issue. Not every situation involving events which took place before the *Charter* came into force will necessarily involve a retrospective application of the *Charter*. In *Gamble*[26] . . . , Wilson J. wrote at pp. 625–27 for the majority that:
>
> > In approaching this crucial question it seems to me preferable . . . to avoid an all or nothing approach which artificially divides the chronology of events into the mutually exclusive categories of pre and post-*Charter*. Frequently an alleged current violation will have to be placed in the context of its pre-*Charter* history in order to be fully appreciated.
> >
> > Another crucial consideration will be the nature of the particular constitutional right alleged to be violated . . . . Such an approach seems to me to be consistent with our general purposive approach to the interpretation of constitutional rights. Different rights and freedoms, depending on their purpose and the interests they are meant to protect, will crystallize and protect the individual at different times.
> >
> > . . .
> >
> > Some rights and freedoms in the *Charter* seem to me to be particularly susceptible of current application even al-

25 *Ibid* at paras 39–40. Justice Iacobucci cites the following authorities: *R v Stevens*, [1988] 1 SCR 1153 at 1157; *R v Stewart*, [1991] 3 SCR 324 at 325; *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 1 SCR 922; *Dubois v The Queen*, [1985] 2 SCR 350.

26 *R v Gamble*, [1988] 2 SCR 595 [*Gamble*].

> though such application will of necessity take cognizance of pre-*Charter* events. Those *Charter* rights the purpose of which is to prohibit certain conditions or states of affairs would appear to fall into this category. Such rights are not designed to protect against discrete events but rather to protect against an ongoing condition [or] state of affairs . . . . Section 15 may . . . fall into this category.[27]

Justice Iacobucci's gloss on these passages from *Gamble* is found in the following paragraph:

> Section 15 cannot be used to attack a discrete act which took place before the *Charter* came into effect. It cannot, for example, be invoked to challenge a pre-*Charter* conviction . . . . Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from *Charter* review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to *Charter* scrutiny today.[28]

As Iacobucci J suggests, it is not permissible to rely on new legislation to change the past legal consequences of a past action. However, the *Charter* does apply immediately to continuing or ongoing situations.

b) Exceptions

In his 1978 article, in summarizing the law governing the presumption against retrospective application of legislation, Driedger wrote:

> 3. The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
> 4. The presumption does not apply if the new prejudicial consequences are intended as protections for the public rather than as punishment for a prior event.[29]

There is also a body of caselaw suggesting that the presumption does not apply if the consequences are purely procedural in character, even though the new law might be less advantageous to an accused or a litigant than the former law.[30]

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27 *Benner*, above note 8 at paras 41–43.

28 *Ibid* at para 44.

29 Driedger, above note 7 at 276.

30 It is arguable that applying new procedural legislation to proceedings, or the portion of proceedings, occurring after the new legislation comes into force is

i) Beneficial Legislation

The reasoning behind the first exception is easy to understand. If legislation confers a benefit on persons, with no corresponding prejudice to others, there is little for anyone to object to. It is true that beneficial legislation may impose costs on government. However, by enacting such legislation, the legislature makes it clear that it intends government to absorb those costs. Giving an immediate application to beneficial legislation is consistent with the general principle that such legislation is to be given a liberal, purposive interpretation.[31]

ii) Legislation Designed to Protect the Public

This exception is formulated broadly, and for the most part it has been applied broadly by the courts.[32] The following passage from the leading case on this exception, *Brosseau v Alberta Securities Commission*, is frequently cited:

> The provisions in question are designed to disqualify from trading in securities those persons whom the Commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.[33]

The caselaw applying *Brosseau* typically deals with obligations imposed on or disqualifications attaching to persons who have run afoul of the law. For example, legislation is enacted obliging persons convicted of certain sexual offences to register or prohibiting persons convicted of fraud from engaging in certain professions. Applying this legislation to persons whose convictions occurred before it came into force is not considered retrospective under the exception because the purpose is not to punish past bad behaviour but rather to protect the public from possible future

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not retrospective since the relevant facts, the submission of evidence for example, occur in the future rather than the past.

31 But see *R v Bengy*, 2015 ONCA 397, which at para 51ff (in *obiter*) casts doubt on the existence of this exception.

32 But see *R v Hooyer*, 2016 ONCA 44 at para 40ff, and *Round v MacDonald, Dettwiler and Associates Ltd*, 2012 BCCA 456 at para 45. Both cases narrow the scope of the exception as formulated by Driedger by focusing less on the purpose and more on the effects of the legislation.

33 [1989] 1 SCR 301 at 321 [*Brosseau*]. Justice L'Heureux-Dubé here speaks of the presumption being rebutted, but Driedger and most courts state that the presumption does not apply to legislation designed to protect the public.

harm.[34] The exception has also been relied on to apply to increases in administrative fines to misconduct occurring before the increase came into force.[35]

iii) Legislation That Is Purely Procedural

Procedural law is law that does not affect substantive rights in any way; it merely sets out modalities for the enforcement of existing rights, obligations, or prohibitions.[36] It is well-established that new procedural legislation applies immediately to pending cases, that is, to cases that have not been definitively dealt with by the legal system.[37] This includes not only cases at first instance but also cases on appeal.[38]

The distinction between procedure and substance is often hard to draw. In attempting to draw it, the courts appropriately look to the real impact of the provision on the position of the parties.[39]

8) Immediate Application

An application of legislation is immediate if the effect is to attach new legal consequences to facts that have not yet fully occurred when the legislation comes into force. There is no presumption against the immediate application of legislation; such applications are considered to be prospective rather than retroactive or retrospective.

The importance of distinguishing between completed facts and facts in progress is well illustrated by the *Benner* case. In *Benner,* the appellant was a man born outside Canada before 15 February 1977, to a Canadian mother and a non-Canadian father. Under the *Citizenship Act*, a person in the appellant's position born to a Canadian father was entitled to claim Canadian citizenship simply by registering. However, because the appellant's connection to Canada was through his mother, he was required to apply for citizenship, a process that involved passing criminal clearance and security checks. When the appellant's application was refused, he invoked section 15 of the *Charter* to challenge the validity of this differential treatment. The first issue dealt with by the court was

34 See also, for example, *Delivery Drugs Ltd v Ballem*, 2007 BCCA 550 at para 82.

35 See, for example, *Alberta (Securities Commission) v Workum*, 2010 ABCA 405, and *Thibault v Da Costa*, 2014 QCCA 2347 at para 28ff. But see also *Thow v British Columbia (Securities Commission)*, 2009 BCCA 46, in which the court applied the maximum fine in force at the time the misconduct occurred.

36 *R v Dineley*, 2012 SCC 58 at para 47 [*Dineley*].

37 *Re Application under s 83.28 of the Criminal Code,* 2004 SCC 42.

38 See, for example, *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2014 ONCA 89 at paras 24–25.

39 *Dineley*, above note 36 at para 11.

whether applying section 15 to these facts would be a retroactive or retrospective application of the *Charter*. Here is the court's conclusion:

> In my view, this case does not involve either a retroactive or a retrospective application of the *Charter*.
>
> The respondent urged us to find that the key point in the chronology of events was the appellant's birth in 1962 . . . . Whatever discrimination took place in the appellant's case, therefore, took place when he was born, since that is when his rights were determined under the impugned legislation. To revisit these rights in light of s. 15, according to the respondent, is therefore inescapably to go back and alter a distribution of rights which took place years before the creation of the *Charter*.
>
> I am uncomfortable with the idea of rights or entitlements crystallizing at birth, particularly in the context of s. 15. This suggests that whenever a person born before April 17, 1985, suffers the discriminatory effects of a piece of legislation, these effects may be immunized from *Charter* review. Our skin colour is determined at birth—rights or entitlements assigned on the basis of skin colour by a particular law would, by this logic, "crystallize" then. Under the approach proposed by the respondent, individuals born before s. 15 came into effect would therefore be unable to invoke the *Charter* to challenge even a recent application of such a law. In fact, Parliament or a legislature could insulate discriminatory laws from review by providing that they applied only to persons born before 1985.
>
> The preferable way, in my opinion, to characterize the appellant's position is in terms of status or on-going condition. From the time of his birth, he has been a child, born outside Canada prior to February 15, 1977, of a Canadian mother and a non-Canadian father. This is no less a "status" than being of a particular skin colour or ethnic or religious background: it is an ongoing state of affairs.[40]

By characterizing the relevant fact situation as an ongoing condition (being the child of a Canadian mother and a non-Canadian father) rather than an event (having been born to a Canadian mother and a non-Canadian father), the court could conclude that applying the *Charter* was immediate rather than retroactive or retrospective.

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40 Above note 8 at paras 49–52. For an example of immediate application of a *Criminal Code* amendment, see *R v Whiting*, 2013 SKCA 127 at paras 15–20.

9) Presumption against Interference with Vested Rights

It is presumed that new legislation is not intended to be applied so as to interfere with vested common law rights, or with "acquired, accrued or accruing" statutory rights. If rights have vested or accrued at the moment new legislation comes into force, it is presumed that the former law under which those rights were acquired survives and that the application of the new legislation is postponed.

To avoid confusion, it is important to distinguish between interfering with rights and interfering with vested rights. It is presumed that the legislature does not wish to do either, but these are distinct presumptions. A right is an interest or an expectation that is recognized and protected by law, either by common law or legislation. By providing a means for persons to acquire and preserve defined interests or expectations and to maintain them in relation to others, the law transforms them into rights. Once recognized by law, rights exist in two ways—first as abstractions, as potentialities that any qualifying individual may have or acquire, and second in concrete form, as interests or expectations actually held by particular persons in particular circumstances. The presumption against interfering with rights is concerned with rights in the abstract: it is presumed that the legislature wishes to preserve or enlarge, but not contract, the class of interests or expectations that the law protects as rights. By contrast, the presumption against interfering with vested rights is concerned with the concrete rights of particular persons: it is presumed that legislation that interferes with rights in the abstract is not meant to apply to concrete rights definitively acquired by persons before the legislation came into force.

Suppose, for example, that a provision was enacted lowering the age to which parents are required to provide financial support for their children from eighteen to fifteen: "Every parent of a child shall provide financial support for that child until he or she attains the age of 15." This provision clearly takes away rights formerly enjoyed by children as a class, some of which would have vested or accrued in individual children. In applying the presumption against interfering with rights, a court might construe the provision strictly (and somewhat implausibly) by defining "parent" to mean "divorced parent" or "support" to mean "support for things other than the necessities of life." But regardless of how the language of the provision is understood, its effect will be to limit children's rights. If the provision is applied immediately, it will affect the rights of all children under the age of eighteen, including those who have already reached fifteen. However, children over fifteen could argue that they had a vested and not just a potential right to be supported

to the age of eighteen. If a court agreed with this analysis, the rights of children in this class would be protected by the presumption against interference with vested rights. In the absence of something to rebut the presumption, the provision would not apply to them. Of course, there is nothing to prevent children under fifteen from also claiming a vested right, but their claim would be less compelling. Children not yet born when the legislation came into force could have no such claim.

As this example shows, to benefit from the presumption against interfering with vested rights a person must show that the right for which protection is sought has vested (or accrued or is accruing). The courts decide which personal interests or expectations are important enough to be labelled "rights" and whether, given the circumstances, they should be considered "vested" or "accrued." The standard common law rights are well defined, and there are rules indicating when they vest or accrue. Outside the traditional categories, however, it is often difficult to predict when a given interest or expectation will be protected as a right.

A vast array of benefits, entitlements, exemptions, and remedies may be sought under legislation, and a wide range of procedures exists for claiming these statutory advantages. In each case the court must decide at what point in the procedure a claimant's hope of receiving the advantage sought is sufficiently crystallized to be recognized as a vested right. The question of what makes an interest or expectation a vested right was addressed by the Supreme Court of Canada in *Dikranian v Quebec (Attorney General)*.[41] Speaking for the majority, Bastarache J wrote:

> [Professor] Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté,[42] at pp. 160–61).
>
> I am satisfied from a review of the case law of this Court and the courts of the other provinces that [this] analytical framework . . . is the correct one.
>
> A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Côté, at p. 161.

41 Above note 6.

42 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed (Scarborough, ON: Carswell, 2000).

> As Dickson J. (as he then was) clearly stated in *Gustavson Drilling*,[43] at p. 283, the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued.
>
> But there is more. The situation must also have materialized (Côté, at p. 163). When does a right become sufficiently concrete? This will vary depending on the juridical situation in question . . . . [J]ust as the hopes or expectations of a person's heirs become rights the instant the person dies . . . , and just as a tort or delict instantaneously gives rise to the right to compensation . . . , rights and obligations resulting from a contract are usually created at the same time as the contract itself (see Côté, at p. 163).[44]

The examples of vesting given by Bastarache J in the final paragraph are easy cases, because both the common law and the *Civil Code* address and resolve the issue of when these expectations ripen into vested rights. However, when it comes to statutory rights, the "juridical situation" is generally not governed by existing rules, and the court must come up with a new solution. In such cases, the governing considerations are degree of surprise and degree of unfairness: the more unexpected the change and the more unfair it would be to diminish or abolish the claimant's expectation or interest, the more likely the court is to recognize and protect that expectation or interest as a vested right.[45] Another important consideration is whether the right to the benefit or interest claimed is dependent on the exercise of discretion: if it is, the right has not vested.[46]

10) Rebuttal of Presumptions

The presumptions against the retrospective application of legislation and against interference with vested rights are rooted in the same considerations as the presumption against retroactivity. However, while the presumption against retroactivity is heavily weighted and difficult to rebut, the weight of the other presumptions varies, depending on the circumstances. As the courts frequently point out, the purpose of most legislative initiatives is to change the law in order to implement new policies

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43 *Gustavson*, above note 6.

44 *Dikranian*, above note 6 at paras 37–40.

45 See, for example, the analysis of the Federal Court of Appeal in *Bell Canada v Amtelecom Limited Partnership*, 2015 FCA 126 at paras 19–22.

46 For a good illustration of the complex analysis often required to determine whether rights have vested, see *Apotex Inc v Canada (Minister of Health)*, 2012 FCA 322 at para 29ff.

that the legislature considers to be in the public interest. This purpose is defeated to the extent the application of the new legislation is limited to avoid interference with vested rights or other forms of retrospectivity.[47]

Ideally, new legislation will include transitional provisions that clearly indicate its intended temporal application. In the absence of such provisions, the full range of interpretive tools is brought to bear. In particular, the courts must balance competing factors:

- the degree of surprise and unfairness immediate application would create
- the importance of the policies implemented by the new legislation
- the impact that postponing or limiting its application would have

as well as any textual or other evidence of the legislature's intent.

A good example of the required analysis is found in the judgment of the Ontario Court of Appeal in *1392290 Ontario v Ajax (Town)*, which considered the application of amendments to property tax legislation that imposed a new, more onerous taxation scheme on property "that was subdivided or was subject to a severance."[48] The appellants' property was severed in 2000; the amendment came into force in 2001. The appellants argued that because the severance pre-dated the amendment, its application to the property in question would be retrospective and would interfere with their vested right to sever their property without adverse tax consequences. The court concluded that the appellants did not have a vested right to favourable tax treatment, relying on the following passage from the judgment of Dickson J in *Gustavson Drilling (1964) Ltd v Minister of National Revenue*:

> [N]o one has a vested right to the continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.[49]

On the issue of retrospectivity, Laforme JA in the Court of Appeal wrote:

> There are two relevant time periods: when the event takes place, and when that event starts to have legal effects. In this case, the "event" is the severance of the original parcel, and the "legal effects" are the tax consequences. Simply put, in our case, the amendments are retro-

47 See, for example, *Waterloo (City) v 379621 Ontario Limited*, 2014 ONCA 231 at paras 4–5.

48 2010 ONCA 37.

49 *Gustavson*, above note 6 at 282.

> spective if they impose different tax consequences for 2001 onwards for a 2000 severance — future consequences for past actions.[50]

Applying the 2001 amendment would thus be retrospective in Driedger's sense. But having considered the wording of the relevant legislation, the evil it was meant to address, and other contextual factors, the court concluded that the presumption against retrospective application was rebutted. LaForme JA wrote:

> [T]he scheme of the Act and the intention of the legislature in enacting s. 447.70(21)(c) was to ensure fair and equal treatment of the two post-severance properties and equal taxation of comparable properties. In my view, this conclusion significantly undermines the appellants' position.[51]
>
> . . .
>
> The retrospective application of s. 447.70(21)(c) is commensurate with the concern for tax fairness. Severance and subdivision materially change the characteristics of the property in question; this change should in turn impact the level of taxation. An impact that results in these newly created parcels being taxed at a level similar to "comparable properties", as contemplated by s. 447.70(21)(c), cannot be said to undermine the purpose of the legislation, viewed as a whole.
>
> In conclusion, the definition of "eligible property", insofar as it includes lands subdivided or severed, operates retrospectively.[52]

This reasoning is exemplary, rooted in a broad contextual analysis that explains and supports the court's conclusion.

11) Principle-Based Analysis

Given the complexity of temporal application rules, and the difficulty courts have experienced in applying them, it is not surprising that they sometimes avoid the rule-based methodology described above and rely more directly on the principles underlying the rules, notably, the avoidance of arbitrariness, unfairness, and surprise. On this approach, the courts focus on the impact of applying the legislation to the facts and the extent to which its application would have these adverse effects. The more egregious the impact, the stronger the inference that the legislation was not intended to apply.

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50 Above note 48 at para 33.
51 *Ibid* at para 25.
52 *Ibid* at paras 44–45.

TAB 9

SULLIVAN ON THE CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

else) adjusts his or her understanding of the world to a greater or lesser degree. The impressions produced by every encounter with social science data leave a trace that affects subsequent encounters with statutory provisions and facts. To ensure the truth and validity of legislative facts, courts must be prepared to have their assumptions challenged. The point is neatly made by Binnie J. in the *Spence* case:

> [W]hat "everybody knows" may be wrong. Until *Parks*, "everybody" knew the solemnity of a criminal trial and careful jury instructions from the judge meant there was little possibility that potential jurors in Toronto would be influenced by racial prejudice (Doherty J.A., at p. 360 of *Parks*, cites a number of trial decisions where race-based challenges for cause were rejected for that reason). Common law judges in early Tudor England would presumably have taken judicial notice of the "fact" that the sun revolves around the earth.[49]

§22.24 Social science evidence not only promotes the truth, but also promotes impartiality. As McLachlin and L'Heureux-Dubé JJ. wrote in *R. v. S. (R.D.)*:

> Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky's "Embodied Diversity and the Challenges to Law" ... offers the following comment:
>
> > What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account....[50]
>
> Judicial inquiry into context provides the requisite background for the interpretation and the application of the law....
>
> An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context ...,[51] from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition.[52]

§22.25 ***Conclusion.*** Under Driedger's modern principle, interpreters are obliged to consider the entire context of the text to be interpreted. As Driedger himself indicated, this includes the external context in its broadest sense. As

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49 *R. v. Spence*, [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458, at para. 51 (S.C.C.).

50 (1997), 42 McGill L.J. 91, at 107.

51 *R. v. Lavallee*, [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.); *R. v. Parks*, [1993] O.J. No. 2157, 15 O.R. (3d) 324 (Ont. C.A.), leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 481, [1994] 1 S.C.R. x (S.C.C.), and *Moge v. Moge*, [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813 (S.C.C.).

52 [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484, at paras. 42-44 (S.C.C.).

courts work out the implications of total context, it becomes increasingly evident that interpretation using the modern principle is hard work. It requires interpreters not only to be experts in language and law (including common law, international law, constitutional law and statute law) but also to develop expertise in history, sociology, anthropology, psychology and more.